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The Bush Theory of the War Power: Authoritarianism, Torture and the So-Called “War on Terror”- A Critique

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The Bush Theory of the War Power: Authoritarianism, Torture and the So-Called “War on Terror” - A Critique

Christopher L. Blakesley* & Thomas B. McAffee**

I. Introduction

Watch your thoughts; they become words. Watch your words; they become actions. Watch your actions; they become habits. Watch your habits; they become character. Watch your character; it becomes your destiny. Lao-Tze

During and after the historic election of 2008 and during the beginning months of President Obama's presidency, important and long-troubling questions were reiterated about the Bush administration’s so-called “War on Terror,” which included untoward arrogation of power in the President. The arrogation included pretended constitutional authority for the President to order absolutely anything if he alleged that it was to fight a war or to protect national security – if the president ordered the conduct, it was not illegal. This arrogation of power poses an obvious danger to our constitutional republic. Part of what President Bush ordered was torture and abduction, euphemized as “enhanced interrogation techniques” and “extraordinary renditions” respectively, of people whom he believed, or wanted others to believe, were terrorists. On January 22, 2009, President Obama has begun the process to make good on his promise to close Guantánamo Bay and to ensure that we no longer “disappear” people and interrogate through torture, cruel, inhumane and degrading treatment, ending our government’s official criminality.¹ The President also promised to create an investigative committee to examine the Bush administration’s brutal interrogation policies. These are important steps, but they are insufficient. The new administration must hold Bush and other high-level officials accountable – even if this means political controversy.

Commentators inevitably compare the current political climate to the similar situation
forty one years ago. In 1968, Senator Robert Kennedy stated a new vision of American political life as he opposed the Vietnam War, an unpopular war that had managed to bring down the Johnson administration.\(^2\) At the time, the state of affairs raised numerous questions in the minds of Americans: who are we as a people? What is happening to our constitutional republic? Has our nation become so afraid and filled with hatred that we willingly accept our government's conduct, even when that conduct transforms us into the very stereotype that we fear and hate?

We found ourselves then, and we find ourselves now, in a rip-tide carrying us to the depths. We must escape the currents pulling us to undermine our nation's values if we are to survive as the people and Republic that we believe ourselves to be. The Bush administration's claims to power and authority, articulated by John Yoo, a former lawyer in the Justice Department's Office of Legal Counsel, are symbolized by the advocacy and use of torture, disappearances, and killing innocent people or killing people suspected of being terrorists in a manner that constitutes murder. This riptide threatened to drag the nation into the abyss. Doing nothing about it allows the threat to continue. The ideology and justifications claimed for these atrocities eviscerate the systems of both separation of powers and checks and balances. If accepted, these changes will forever transform our constitutional republic. We need to understand just how wrong, on every level, the Bush administration and John Yoo have been in their quest to expand executive war-making power. This article challenges their attempts to create an imperial presidency.

In 1969, one of the Johnson administration's sharpest critics, Francis D. Wormuth, published a critical analysis of that administration's constitutional defenses of the Vietnam war.\(^3\) Wormuth followed this analysis with his 1972 critique of “The Nixon Theory of the War Power,” the Nixon administration's revised efforts constitutionally to justify the war in Vietnam.\(^4\)
Shortly after, Professor McAffee took Wormuth's political science course on constitutional law as a preparation for law school.\textsuperscript{5} Sadly, our nation has learned little in the forty one year struggle over the decision-making process by which we go to war;\textsuperscript{6} even more tragic is the Bush administration's expansion of the arguments on behalf of basically unlimited presidential power with respect to decisions on going to, and prosecuting, a war.\textsuperscript{7}

When Professor Wormuth published his 1972 critique of “the Nixon theory of the war power,” a single issue loomed toweringly over the war powers debate: may the President, as the commander-in-chief of the military and as the chief executive of the nation, unilaterally commit American armed forces abroad to engage in military hostilities – notwithstanding the Constitution which granted Congress the power “to declare war.” Almost from the beginning of the Cold War, there emerged the outlines of what eventually became a full-fledged constitutional dispute.\textsuperscript{8} After getting the Soviet Union to boycott meetings of the UN Security Council, and thereby avoiding a veto of the Council’s action, President Truman convinced himself that a Security Council resolution adequately authorized committing American troops to the Korean War.\textsuperscript{9} Indeed, Truman not only failed to seek congressional authorization, he specifically decided against an offer in Congress to seek one.\textsuperscript{10} The relationship between the two branches has never been the same.\textsuperscript{11}

Expanding on this precedent established by a war effort inaugurated by the executive branch, President Lyndon B. Johnson justified his overwhelming expansion of the Vietnam War by claiming that the entire Vietnam War had been authorized by an act of Congress, namely the Tonkin Gulf Resolution. But as the controversy over that war grew, Congress eventually repealed its resolution,\textsuperscript{12} and the Nixon administration then alleged that the war was validly
advanced based exclusively on the President's power as commander-in-chief. President Nixon eventually vetoed – a veto that was overridden – the 1973 War Powers Resolution, which attempted to require congressional authorization prior to most executive decisions to engage in war-making.

Along similar lines, on September 25, 2001, exactly two weeks after the infamous events of 9/11, John Yoo, wrote a memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President. Yoo asserted that the President held the unilateral, “inherent,” authority to “deploy military force preemptively” against not only terrorist organizations and “States that harbor or support them,” including such States, “whether or not they can be linked to the specific terrorist incidents of September 11.”

In Yoo, the Bush administration had found a prominent legal scholar who managed to assert very broad executive war-making power, and, consistent with established conservative ideology, had claimed, even prior to September 11, 2001, that a very broad Presidential war-making power was consistent with the original understanding. Yoo became was “one of the most important lawyers in government, a [vital and influential] member of a secretive five-person group with enormous influence over the administration's antiterrorism policies;” the “War Council,” as the group called itself, made decisions on its own, without input from Jay Bybee, the head of the Office of Legal Counsel, who had no knowledge of the group.

The Bush administration hijacked the infamous and horrific tragedy of the 9/11 terrorist attacks to justify committing American troops to defend the United States and preemptively attack any State or organization that the Administration saw fit. Moreover, the administration manipulated the public's fear and outrage surrounding the attacks to promote its underlying
agenda: an authoritarian regime. A series of memoranda and opinions chronicle its attempts to create such a regime. 20

This usurpation of power since 9/11 and the commencement of the war on terror implicates three crucial questions. First, as previously posed during the Truman and the Johnson administrations, does the President have the power to unilaterally commit troops to engage in foreign hostilities without Congressional approval? Second, just as Congress tried to cabin the Nixon Administration with the 1973 War Powers Resolution, should Congress have placed limits on the Bush Administration's commander-In-chief powers, once Congress had authorized war? Finally, should some members of the Bush administration be prosecuted criminally under international law for committing atrocities in its self-justified “War on Terror?"

II. The Flaws of Preemptive or Anticipatory Self-defense

Anticipatory self-defense is not self-defense at all. It is nothing more than self-centered, self-justified, and self-serving use of force. The Reagan, Bush I, and Bush II administrations argued that it is “justifiable self-defense” to preempt anticipated terroristic activity with military force or to retaliate with violence against terrorists or states that harbor, finance, or train terrorists. 21 Moreover, abduction of alleged “terrorists” or even common criminals from abroad also falls within this definition of “justifiable self-defense.” 22 The Reagan, Bush I, and Bush II administrations argued that the only judge of a self-defense claim is the claimant, and the claimant inevitably is the executive (not Congress). A decision to take such measures of “self-justified self-defense,” thus, becomes per se legal. This is the reality of accepting Yoo’s argument that the executive can start a war, as discussed in greater detail below.

This circular reasoning gave us the Iraq war, for example. The Bush administration perceived or exaggerated a threat, so we attacked Iraq in so-called “self defense.” The threat was
found to have been nonexistent, but because we acted in self-justified so-called “self defense,” they literally “made-up” the threat and we fell into the miasma of that war. The logic went like this: Threat $\rightarrow$ Attack, but in the same way, (Desire to) Attack $\rightarrow$ (Creation of) Threat. This reasoning is dangerous when contained within a single nation, let alone the single-party executive branch. Vice President Cheney even admitted that we would have gone to war no matter what.\(^{23}\) Under the Bush administration's scheme, no other person, no other branch of government, and certainly no other nation or institution could have questioned such military action taken under the guise of self-defense. For example, the bombing of Tripoli, which targeted Muammar Al-Qaddafi, the leader of Libya, by attacking his family compound, was argued to be in “self-defense.”\(^{24}\) Although Qaddafi was not killed, his adopted baby girl was killed, and there were at least 100 civilians casualties.\(^{25}\) With the so-called War on Terror, we find ourselves making the same tired argument once again. In addition to its ultimately illegal, immoral, and self-destructive nature, an obvious practical danger of this attitude of self-justification is that other nations or groups may utilize it as well. When many nations and groups use it, the rule of law disappears and is replaced with raw power. The rule of law and self-defense become nothing more than pretext, propaganda and public relations.

President George W. Bush, in his State of the Union Message in January 2002, “warned” about the “axis of evil”– North Korea, Iran and Iraq – suggesting that a preemptive strike may not be out of order. Does this rhetoric help or hurt? Could threats like that and the pre-emptive actions taken prompt countries that consider the United States to be a danger or a problem to claim justification for a preemptive strike or other action against the United States? Similarly, might the same be true for some radical terrorist group trying to bolster its image among its adherents or potential adherents, or wishing just to do terrible damage to the United States?
Indeed, such rhetoric and self-justified action may provide a stronger case for self-defense than the so-called (now known to have been trumped-up) “threats” that the United States used as pretext to attack Iraq. Might groups that consider themselves violated, threatened or even potentially threatened (for potential is all that is needed in the Bush Doctrine) by the United States feel “justified” or claim justification for pre-emptive attacks by nuclear, chemical, biological, or other weaponry of mass destruction?

When self-justification replaces the rule of law and actual self-defense, and unilateral, authoritarian power is elevated to claimed legality, the rule of law disappears in any meaningful context.26 Self-justifying self-defense allows any nation or group to claim legality to commit any aggression, with nothing more than the self-justified claim of “self-defense.” If one has the power to succeed (and even an inkling of ill will is perceived against one’s nation), one is “justified.” It is fearsome that many world leaders adopt the Regean, Bush I, and Bush II administrations’ view of international law and self-defense. When self-justified self-defense is used to “justify” torture, as it has been by Yoo and the Bush administration, it provides a pretense of justification for those who wish to torture United States citizens or soldiers. In the long run, self-defense will come down to raw power and opportunity. Legality and self-defense are eviscerated.

In addition, self-defining, self-justifying, self-defense naturally leads to an erosion or evisceration of domestic democratic constitutional order. It erodes the ideas of separation of powers and checks and balances in the United States Constitution because it accepts executive branch absolutism. Yoo’s vision of expanded executive power to initiate war necessarily means that it is up to the president alone to decide whether a threat exists that would justify war. Thus, for Yoo and the Bush administration apologists, even if Congress disagrees and believes that the
executive branch did not have the right to act, the conduct is still justified under this wrong-headed version and propagandistic appropriation of “self-defense” because the claimant under these circumstances is the executive branch and need not be affirmed by Congress. So, in this dangerous view, the executive branch is essentially empowered to go to war with no checks on its authority before initiating aggression nor after such aggression is found to be an abuse of power.

A related abuse is the use of so-called “extraordinary renditions” or the abduction of alleged terrorists to be tortured or simply to disappear. Disappearing, torturing, and murdering “terrorists,” or so-called “enemy combatants,” on the basis of the mere word of the President or his designee is an even more horrifying example. Abduction has even been used as a tool of law enforcement to capture and prosecute criminals. In fact, much of the abuse occurring in the United States criminal justice system and elsewhere today is based on the pretense of a “war” or “self-defense” model: “War on Terror,” a “War on Drugs” and a “War on Crime.”

Self-justified self-defense is strikingly similar to the ancient Russian, then the former Soviet, the current Russian, and ancient Germanic notions of “necessary defense.” The ancient German concept of das Recht (“the law,” writ large) combined with the idea of “necessary defense” (Notwehr) and the Russian version of these same notions (neobxodimaja oborona) provide that any right or defendable interest, from life to personal honor, receives the same degree of protection and privilege. The only questions are whether a right or interest is threatened and whether the defensive action is “necessary.” If one is threatened, good social order is equally threatened. “Necessary defense,” therefore, is triggered. Any force necessary to prevent the invasion of the right or interest, and the concomitant destruction of “good order,” is justified. The people and the state have a duty to defend themselves and “ordre public” or “
good order" sometimes called public policy and part of a nation's Volksgeist.33 This, obviously, may be abused, such as when it is represented by claims of "national security," or social protection.34

In both the old German and Russian conceptualization of “necessary defense,” the ideas of “Legal Order” (die Rechtordnung) and social dangerousness (protivopravnost) identify “necessary defense” with protection of the Legal Order in its entirety.35 Thus, attacks on places such as the Sudetenland and Poland at the beginning of World War II, as well as the attempted "elimination" of many perceived or claimed “threats" to the Legal Order such as the Jewish population, the Roma, “deviates," the insane or otherwise “mentally deficient," communists, or similar enemies of the Third Reich, were seen as justified in the name of self-justified “necessary defense."36 The same thing occurred in Stalinist Russia, Pinochet's Chile, the Argentine “Dirty War," the former Yugoslavia, Rwanda, Tibet, East Timor, Sierra Leone, the Democratic Republic of Congo, and so it goes, on and on. Self-justifying self-defense lends itself to authoritarianism and brutality.

The policy of self-justified self-defense and the cliché, “one person's terrorist is another's freedom fighter," are really propagandistic appropriations37 of the rule of law. Today, terrorism and counter-terrorism are analogous to the increasingly popularized vigilantism that grows with the erosion of the rule of law and the Constitution. Nationalistic solutions to terrorism and other crimes against humanity assume that such offenses are committed only by “the others” who must be “the enemy.” Therefore, whoever is designated “the enemy" is perceived as evil; the argued solution is to eliminate the enemy and to give impunity to those who eliminate, torture, or kill them. The rights of those who fit the propagandistic model of “the enemy" lose their rights first, but in the long run, all denizens of the claimant nation or group lose their rights. Obviously,
when the leaders of all sides to a conflict have spread this self-justified, belligerent attitude to their people through propaganda, fear-mongering and the like, military power is accepted as the only medium for “protection” and the only means to be used in international relations. Sadly, many in conflict take this track much of the time. The rule of law and constitutional or human rights protections are thrown aside.

At the present time, as the so-called War on Terror drags along, a second large war powers dispute has emerged, which, ironically enough, may teach us how to think through the issues raised by the prospect of unilateral executive war-making. The emergent issue relates to Congress's authority to regulate, restrict, or prohibit actions that the President, in his role as commander-in-chief, might want to take as he determines the most effective way to fight a conflict, even one that unquestionably has been authorized by Congress. One hopes that President Obama will maintain or re-establish constitutional policy and addresses the criminality that has been our scourge for eight years.

On August 1, 2002, about eleven months after the 9/11 attacks, John Yoo wrote another memorandum that was submitted to President Bush's legal counsel, Alberto Gonzales.38 This second memorandum attempted to confront “the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by 18 U.S.C. §§ 2340-2340A.”39 Even prior to analyzing the constitutional bases for the enactment of such laws, Yoo contended that as commander-in-chief, the President has constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.40
Although ominous in itself, this claim is especially ominous given the Bush administration's argument that the “War on Terror,” which ostensibly authorizes the President's exclusive control over the detention and interrogation of enemy combatants, is to be ongoing and “necessary” indefinitely. To confront this second war powers issue, it will be helpful to go back to the issue with which the current era began: which branch has the power to “initiate” war?

III. The Controversy Over the Authority to “Initiate” War

A. The Text of the Executive's Vesting Clause

Yoo, in a memorandum for the Justice Department's Office of Legal Counsel, claimed extremely broad, and apparently permanent, presidential authority over the decision to go to war: [t]he text, structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause, U.S. Const. Art. [II], § 1, cl. 1, and by the Commander-in-Chief Clause, id., § 2, cl. 1.41

Yoo's startling claim asserts that the President's unilateral power to “deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause of U.S. Const. Art. II, § 1,”42 even before application of the Commander-in-Chief Clause. This sort of reliance on the Article II “Vesting Clause,” scholars observed, “emerged for the first time in 1793 in the context of [Alexander] Hamilton's defense of President George Washington's Proclamation of Neutrality.”43 Professor Adler points out that [i]n the course of his essays written as Pacificus, Hamilton applied the initial gloss on executive power in his claim of an inherent presidential power. Hamilton emphasized the differences between the Constitution's assignment to Congress in Article I of all legislative power herein granted and the more general grant in Article II of the executive power to the president. Pacificus claimed that the Constitution embodies an independent, substantive grant of executive power. The subsequent enumeration of specific executive powers was, he argued, only intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power. He added: 'The general doctrine
then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.\textsuperscript{44}

Yet, even if the “Vesting Clause Thesis” – the phrase now used to refer to Hamilton's argument that Congress is limited to the powers “granted” while the President holds inherent executive powers in addition to the powers expressly granted – were rooted in historically defensible analysis of constitutional text,\textsuperscript{45} the Constitution still would not have “expressly placed” the power to initiate a war in the President's hands.\textsuperscript{46} At its best, the Vesting Clause Thesis arguably strengthens the idea that Presidents hold an inherent (not “express”) authority to conduct American foreign policy.\textsuperscript{47} In turn, this idea may support the conclusion that a president must address a fundamental question of foreign policy: whether to “deploy military force in defense of United States interests,”\textsuperscript{48} and, whether such action be taken only in self-defense, where there is no time to obtain prior Congressional approval. As a matter of fact, Alexander Hamilton's Vesting Clause Thesis has been the subject of withering critiques through the years.\textsuperscript{49} It was not a consistently maintained position even by its originator, Alexander Hamilton himself,\textsuperscript{50} and the United States Supreme Court simply rejected the argument.\textsuperscript{51}

\textbf{B. The Necessity for a Vesting Clause Thesis?}

As we have seen, Yoo's memorandum claimed that broad presidential war power could be derived from the “text, structure, and history” of the Constitution. Yoo was sufficiently confident of this assertion—based on the assumption that the Vesting Clause Thesis infers extremely broad executive authority over foreign policy\textsuperscript{52} – that, according to Professors Bradley and Flaherty, the Bush administration intended to rely on the Vesting Clause Thesis to support going to war in Iraq if Congress did not affirm.\textsuperscript{53} The thesis, however, has problems
that go beyond the mere text of the Vesting Clause. Bradley and Flaherty observed that Yoo's and the Bush administration's interpretation of the Vesting Clause is in rather obvious “tension with the enumerated powers structure of the Constitution.”

They note:

The Constitution lists the powers of the three federal branches in great detail, and the Founders emphasized that they were creating a national government with limited and defined powers. James Madison stated in the Federalist Papers, for example, that the national government “is limited to certain enumerated objects,” and that “[t]he powers delegated to the federal government are . . . few and defined.”

Why does Yoo urgently try to get beyond what appears to be the plain thrust of the Constitution's text—a thrust reiterated by Madison in The Federalist Papers? It may be that the constitutional text itself grants an express war power to the President, namely the President's power as “commander-in-chief.” Historians contend that the commander-in-chief power is not an independent source of war-making authority. Yoo relies on a novel reading of the history to counter the otherwise plain meaning of the constitutional text. As Professor Ramsey notes, Yoo stresses the fact that “[w]hen we speak of 'declaring' war, we usually mean issuing a formal proclamation, indicating that a legal state of war exists between two nations.” Ramsey continues:

Whatever the Declare War Clause's meaning, then or now, it does not obviously refer to the decision to initiate military action. Instead, Yoo contends, it refers, like the Declaration of Independence, to an (optional) announcement of a new legal status—a sort of official recognition that the nation is at war . . . . This being so, though, it cannot serve the function modern commentators would assign to it: taking war-initiation power away from the President.

Yoo thus asserts that the Declaration of War Clause embodies what Professor Prakash labels the “‘formalist theory' of 'declare war,' meaning that it 'supposes that congressional declarations of war were always documents of marginal significance.” If the power to declare war refers to an extremely formalistic idea of merely re-stating that a “state of war” legally exists merely for
purposes of customary international law, an immediate question is raised. What institution in the national government is authorized to make the decision to fight a war?

For Yoo, both history and functional considerations supply the answer to that question, and hence explain his enthusiasm for Hamilton's Vesting Clause Thesis as well. If the power to "declare" war is a purely formal power, where would one look to discover the institution empowered to decide to fight a war? According to Yoo, the answer is found in English history, where the "executive branch," as embodied in the king, was empowered to make the decision to fight a war. The English system, says Yoo, generated a meaningful system of separated and checked powers.60 The English executive branch played the central role in decision-making about war, but Parliament also played an important role, by funding enacting implementing legislation, and impeaching executive ministers. As understood by Yoo, the English Parliament was effectively empowered, through its legislative authority over money, to check and limit the king's power by refusing to finance untoward military adventures. By analogy, Yoo concluded that "the Articles of Confederation followed the traditional operation of the foreign affairs power that began in Great Britain in the 1620s and continues through the American Critical Period of the 1780s."61 Similarly, Yoo asserts, under the most significant and influential of the state constitutions, the governor, as the commander-in-chief, held broad authority to expansively use military power, while the state's legislative assembly could block actions by the commander-in-chief by refusing to authorize funding.62 Indeed, Yoo insists that the Framers "were part of a political world that saw a sharp distinction between the exercise of executive and legislative powers in foreign affairs," and some powers, "such as the war and treaty powers, were understood to rest with the executive branch."63 But the "executive" to which Yoo refers is a state's governor, not a nation-state's king, even though the governor did hold the position of chief
military commander. Indeed, the office of commander-in-chief “was introduced by King Charles I in 1639,” and historically had become “a generic term referring to the highest officer in a particular chain of command;” on the other hand, it had “never carried the power of war and peace.”

And though Yoo acknowledges that the states often displayed suspicion of executive power during the revolutionary era, he still asserts that the state constitutions in general “retained the prerevolutionary system of independent executive warmaking.” Yet the only reason Yoo’s historical thesis might retain any shred of credibility is because of a critical ambiguity in the text of the Articles of Confederation, the first constitution of the revolutionary-era American system of national government. Based on the text alone, Yoo contends in defiance of virtually all we know of the history that when Article IX of the Articles of Confederation stated, “[t]he united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war,” this did not mean that the war decision was to be a collective one made by the representatives of the people, who happened to live in the various states. Rather, inasmuch as the Continental Congress was not really a legislative body, but was conceived of as a plural executive branch, Yoo was positioned with some meager plausibility to conclude that the Articles simply replicated the English constitutional system for going to war.

But the Articles of Confederation did not grant the national government adequate powers over foreign relations, which is one of the reasons the United States so desperately needed to adopt the proposed federal Constitution. Even so, one seriously might question the significance of the relative breadth of discretion recognized in governors when acting as the
commander-in-chief of state militias when one realizes that it was the national government, and not the individual states, that retained “the sole and exclusive right and power of determining on peace and war.”71 Moreover, Arthur Schlesinger testified before the Senate Foreign Relations Committee that the “Framers understood the commander in chief clause . . . as conferring merely ministerial function, not as creating an independent and additional source of executive authority.”72

For one thing, the state militias were in their nature a “home-grown” product designed to enable the citizens of a state to defend their homeland;73 the Framers supported having state militias, in contrast to standing armies, precisely because their sole purpose was to defend the areas in which Americans lived, not to support foreign military adventures.74 Although the Framers conceived of a system in which the governors of individual states retained exclusive power over the state militias, Yoo is incorrect in extending this principle to assert that the states held the authority to make war or that the Framers intended for the Executive Branch to retain the exclusive power of war-making authority.

C. What We Learn from the Constitutional Convention

Presented to the 1787 Philadelphia Convention late in May of 1787, the Virginia Plan contemplated that the proposed Executive “ought to enjoy the Executive rights vested in Congress by the Confederation.”75 Thus, the Plan conceivably implies that the Executive was given the power over war.76 Even so, as Professor Yoo acknowledges, a number of delegates at the Philadelphia Convention “were unsure whether it would be wise to transfer to the president all of the Continental Congress's executive authorities.”77 For example, Charles Pinckney asserted that he “was for a vigorous Executive but was afraid the Executive powers of [the
existing) Congress might extend to peace & war & c which would render the Executive a Monarchy, of the worst kind, to wit an elective one.”78 The Framers held some powerful reasons to avoid making the Chief Executive the equivalent of a monarch—some of which related directly to the subject of initiating war.79

Similarly, John Rutledge “was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace.”80 To the same effect, [a]lthough James Wilson supported a single executive for its “energy, dispatch and responsibility to the office,” he too warned that the convention should not adopt the British division of executive and legislative powers. Wilson “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace & c.” 81

Pinckney, Rutledge, and Wilson were in complete harmony that the “British division of executive and legislative powers" would not do for America's republican form of government, with the executive, like the King, holding the power over war and peace.82

Though Yoo acknowledges the existence of this series of exchanges about the appropriate scope of executive power, he fails to note83 what others have observed: although the Virginia Plan was not brought to a vote at this time, these exchanges reflected a strong consensus “that 'determining on war' – which can only mean a decision to initiate war – was a legislative power.”84 In perfect conformity with the consensus already identified at the Philadelphia Convention, and consistent with the pattern established by the Articles of Confederation, the committee charged with drafting the Constitution in conformity to the decisions that had been made at the Convention, returned with proposed language that granted the national legislature – the Congress – the power “to make war.”85

In the discussion that followed, Mr. Pinckney stated a preference for extending the power
over war to the Senate, while Mr. Butler favored “vesting the power in the President,” stating a confidence that the President would “not make war but when the Nation will support it.”

When Elbridge Gerry was sufficiently surprised to express his view that he “never expected to hear in a republic a motion to empower the Executive alone to declare war,” it became clear that “Butler stood alone in the Convention; there was no support for his opinion and no second to his motion.” Indeed, John Ely observes that Pierce Butler is the “only one delegate to either the Philadelphia convention or any of the state ratifying conventions . . . recorded as suggesting that authority to start a war be vested in the president.” Butler later described the Convention’s rejection of Pinckney’s motion to vest the Senate with “the sole power of making war and peace,” and the rejection of his own motion to vest the power in the President. He observed that “[s]ome gentlemen were inclined to give this power to the President, but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in war whenever he wished to promote her destruction.”

In the setting of this discussion of whether the entire national legislature, the Senate or the President, should have the power over the decision to make war, Madison's notes reveal that Mr. Madison and Mr. Gerry “moved to insert ‘declare,’ striking out ‘make’ war; leaving to the Executive the power to repel sudden attacks.” In contrast, Yoo claims that the Convention notes reflect “confusion over the amendment,” suggesting that “Madison and Gerry did not explain its meaning to the assembled delegates.” Yoo concluded that the overall thrust of the Convention debate over establishing the war power confirms that, at least as of August 17, 1787, “the Framers did not possess a clear consensus on the Declare War Clause.”

The uncertainties generated by the foregoing Convention debate are too easily overstated,
even if it is fair to describe the debate as “garbled, cryptic, and open to interpretation.”

Stephen Holmes correctly observed that “two things come through with ringing clarity”:
First, the word ‘declare,’ as the Framers used it, had a loose and fluctuating meaning.
Second, most participants in the discussion agreed on the importance of limiting
the president's war powers by granting important war powers to Congress. This
consensus stemmed from the conviction that war is the nurse of executive
aggrandizement and that the President, whose powers balloon unnaturally in
wartime, has a dangerous incentive to contrive and publicize bogus pretexts for
war.

We learn both from this Convention discussion and many statements that flowed from the same
premise that there was a general preference for “clogging” rather than “facilitating” the process
for going to war. Professor Ely concluded: “[A]uthorization by the entire Congress was
foreseeably calculated, for one thing, to slow the process down, to insure that there would be a
pause, a 'sober second thought,' before the nation was plunged into anything as momentous as
war.”

Was part of the purpose in changing “make” to “declare” to limit, greatly, Congress’s
power over war-making decisions, or to expand, greatly, the President's authority to “make"
war in the absence of a congressional declaration or authorization? Senator Goldwater
argued that “the founding fathers in their wisdom foresaw the day when . . . a Congress divided
amongst different minority interests would be loath to give proper direction to a single American
course” and hence “thought the power of war and peace might better be vested in a single man.”

The only alternative to the theory that the shift from “make” to “declare” created a source of
executive war-making authority is to emphasize the Vesting Clause Thesis. But under either
rationale, the history simply does not support expansive executive authority to wage war.
Professor Ramsey has provided powerful evidence to support the view that advocates of an
expansive presidential war power mistake the Framers' meaning by “insisting upon too narrow a meaning of the phrase ‘to declare war.’”

He continues:

True, its most common meaning was to issue a formal proclamation. But eighteenth-century terminology also recognized that war could be 'declared' by conduct. That is a nation could 'declare' its intention to go to war simply by launching an open attack. Once this broader meaning is appreciated, we can make sense of founding-era statements about war-initiation power as a congressional power.

Ramsey's insight into the usage of language in the eighteenth century is supported by both the debate over the relative strength of the executive branch and the standard understandings of the constitutional language in historic England, and in the United States during the founding era. Recall that in the debate at the Philadelphia Convention, Elbridge Gerry “rephrased Butler's proposal that the President be given the power to 'make war' as a motion 'to empower the Executive alone to declare war.'” The tendency to equate “making” with “declaring” war was pervasive in the founding era, and the practice has continued.

It is also noteworthy that Charles Pinckney recommended giving Congress the power to issue letters of marque and reprisal, a proposal approved on September 5, 1787. Joseph Story later suggested that this was done to clarify that Congress' power over war included “the authority of Congress to authorize some form of undeclared hostilities.” Indeed, this power was considered adequate “to authorize a broad spectrum of armed hostilities short of declared war.” Unsurprisingly, Alexander Hamilton asserted that the President could employ ships as convoys, with orders "to repel force by by force, (but not to capture)" because to do more “must fall under the idea of reprisals & requires the sanction of that Department which is to declare or make war.”
D. Understanding What it Means to "Declare" War

Because the Framers did not hold Yoo's view of what it meant to empower Congress with the authority “to declare war,” it does not matter whether one accepts the validity of the Vesting Clause Thesis. As we have shown, Alexander Hamilton, who insisted on emphasizing the differences in the wording of Articles I and II of the Constitution, stated views about the war power that directly contradict those of Yoo. At the Convention itself, on June 18, 1787, Hamilton presented his plan for government, in which he would have given the Senate – not the President – “the sole power of declaring war.”\textsuperscript{114} When Alexander Hamilton submitted a plan to the convention on June 18 he probably did not propose the title commander-in-chief, but he undoubtedly had it in mind when he said the president was ‘to have the direction of war when authorized or begun.’\textsuperscript{115} In the Federalist Papers, Hamilton went to some lengths to contend that the power granted to the President would be far less threatening than the power held by the King of England. As Louis Fisher observed, “Hamilton explained that the power of the king ‘extends to the declaring of war and to the raising and regulating of fleets and armies.’” In contrast, the Constitution placed these powers expressly with Congress.\textsuperscript{116}

1. The "Original Understanding" and the Evidentiary Shortfall

Those representing the states in the ratification process were “little concerned with how the new government would initiate war.”\textsuperscript{117} Unsurprisingly, the “[c]ontemporary newspaper, pamphlet, and state convention debates display a similar lack of attention to the allocation of the war-making power.”\textsuperscript{118} As previously noted, whereas war-related issues generated a single proposed constitutional amendment,\textsuperscript{119} a host of other issues, from elections to individual rights and privileges to taxation and finance, gave rise to numerous proposed constitutional
amendments. 120

Despite this lack of focus on the war allocation question, Yoo insists that “[w]hat those who ratified the Constitution believed the meaning of the text to mean is . . . more important than the intentions of those who drafted it. It is the original understanding of the document held by its ratifiers that matters, not the original intentions of its drafters.” 121 Yoo thus contends that the two major items “that have been overlooked in previous foreign affairs works” are a careful analysis of the British “approach to war powers” and “the discussion of the Constitution in the state ratifying conventions.” 122 However, when the delegates to the Philadelphia Convention expressed their reservations about granting undue powers to the executive branch, it was precisely their familiarity with the English system – and its system for going to war – that prompted their concern. 123 Surely Professor Ramsey is on the mark in suggesting that Yoo's work “relies too much on the English experience, without recognizing ways the Framers sought to depart from that experience.” 124

The allocation of the war power was not a central area of focus at the convention. Nevertheless, Professor Lofgren still observes that in the debate over ratification “several comments strongly hint that Americans in 1787-88 thought the power to declare war assigned to the new Congress was practically identical with the old Congress' power of determining on war.” 125 According to Lofgren, John Jay, for one, “implicitly equated the power of the old Congress to determine on war with the power to declare war,” 126 and Livingston observed that as some had asked if “our present [Confederation] Congress have not the same powers [as the new Congress], I answer, They have the very same . . . [including] the power of making war. . . .” 127 It is against this backdrop that we can best understand why the Federalist proponents of the
Constitution were so adamant about distinguishing the powers granted to the President and those held by the King of England. Professor Adler reminds us:

For example, James Iredell stated in North Carolina: “The President has not the power of declaring war by his own authority. . . . Those powers are vested in other hands. The power of declaring war is expressly given to Congress.” And Charles Pinckney, a delegate in Philadelphia, told the South Carolina Ratifying Convention that “the President’s powers did not permit him to declare war.” Hamilton, moreover, had stated flatly that the “declaring of war . . . by the Constitution . . . would appertain to the legislature.”

In the Pennsylvania Ratifying Convention, James Wilson “explicitly foreclosed the exercise of the power by the President acting alone.” Wilson offered this analysis:

This [new] system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

Professor Ramsey sums up the views of the founding generation – including both co-authors of The Federalist Papers, James Madison and Alexander Hamilton – on the meaning and scope of Congress's power to declare war:

In the post-ratification period, when leading Americans spoke of initiating war, they almost always spoke of it as a congressional power. On this point, Madison and Hamilton, despite their differences, agreed. Madison wrote: ‘The Constitution supposes, what the History of all Govts. demonstrates, that the Ex. Is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.’ Hamilton agreed: ‘It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings by placing the nation in a state of War.’ And Chief Justice Marshall later said that ‘[t]he whole powers of war’ were ‘by the Constitution of the United States vested in Congress.’

As Louis Fisher has observed, “Jefferson praised this transfer of the war power ‘from the executive to the Legislative body, from those who are to spend to those who are to pay.’"
2. The Meaning Revealed by Practice and Precedent

Notwithstanding Yoo's reliance on what he takes to be the original understanding of the Constitution's text, he readily embraces that “[b]oth the Supreme Court and the political branches have often recognized that governmental practice represents a significant factor in establishing the contours of the constitutional separation of powers.” Originalists who sit on the Supreme Court have adopted the same view. In *Eldred v. Ashcroft*, the Court “justified its ruling on a longstanding ‘principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution’s] provisions.’” The views expressed by the modern Court are completely consistent with the claim that we can understand the constitutional law of war not only by the original understanding, but also “by the constitutional law of usage.”

Several modern commentators have expressed similar views. H. Jefferson Powell observes that on appropriate occasions “[e]arly practice” should be used “as an authoritative gloss on the Constitution,” considering that sometimes “it is impossible to state an ‘original’ understanding of the Constitution because our evidence is defective, the issue was not addressed, or the evidence in the framing and ratification debates is contradictory.” Michael Glennon concurs, noting that the modern Supreme Court has acknowledged that “the precedential value of prior incidents involving the challenged practice ‘tends to increase in proportion to their proximity to the Convention of 1787.’”

The understandings of all three branches of the federal government are powerfully illustrated early in the nation's history in what has been described as the “quasi-war” with France.
Dean Alfange observes that “there are at least two statements that may be made with certainty about this undeclared war. It was a war, and it was undeclared.” When the Supreme Court was asked to rule on constitutional issues raised, Alfange points out, “[n]one of the justices had the slightest doubt that ‘Congress is empowered to declare a general war, or Congress may wage a limited war.’” One scholar, following the language of Article I, states that a “specific authorization of armed force against the territory or possession of another country does not fail a prerequisite congressional declaration of war . . . simply by the nature of the objectives or extent of war that it may authorize.”

Or, put the other way, the Quasi-War and its resulting cases demonstrate that “Congress may constitutionally authorize offensive military action by means other than a declaration of war.” Stated either way, though it was quite clear that Congress had not formally declared a general war, President Adams himself recognized that “Congress had as a functional matter 'declared war within the meaning of the Constitution' against France, but 'under restrictions and limitations.'”

Accordingly, it cannot be surprising that Chief Justice Marshall, in *Talbot v. Seeman*, stated:

*The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial war, in which case the laws of war, so far as they actually apply to our situation, must be noticed."

The Court itself took these words rather literally, as was illustrated in its ruling in *Little v. Barreme*. Professor Kinkopf describes the Court's holding this way:

*Congress had authorized the President to intercept any American ship bound for a French port. President Adams issued an order directing naval officers to intercept any suspected American ship bound to or from a French port, disregarding the
statutory limitation to ships bound for a French port as undermining the central purpose for preventing trading with the enemy. Captain Little captured the Danish-flagged Flying Fish as it traveled from the French port of Jeremis to the Danish port of St. Thomas. The issue in *Little* was whether Captain Little owed damages for wrongfully seizing the Flying Fish. Chief Justice Marshall ruled that a capture was not authorized by statute and could not be authorized by the President attempting alone to overcome the statutory limitation (even though in the absence of a statute, the President might have had such authority).150

The nation's approach to going to war did not change over night. Indeed, members of the executive branch have been more often the most effective proponents of the theory that Congress holds the predominant role.151 It was a Secretary of State, John Quincy Adams, who in an 1824 reference to American war-making, affirmed to another nation, Colombia, that “by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government."152 One of our most distinguished constitutional historians, Professor Currie, concluded that the process contemplated in the text of the Constitution was consistently followed in the early days of the republic:

[T]he express position of every President to address [war powers] during the first forty years of the present Constitution was entirely in line with that proclaimed by Congress in the War Powers Resolution in 1973: The President may introduce troops into hostilities only pursuant to a congressional declaration of war or other legislative authorization, or in response to an attack on the United States.153

Unsurprisingly in view of this history, the nation's most prominent commentators uniformly have displayed a much more accurate perception of the original understanding than recent administrations of the executive branch. Chancellor James Kent, an eminent nineteenth century jurist and commentator, wrote in 1829 that “war cannot lawfully be commenced on the part of the United States without an Act of Congress."154 Joseph Story, an important commentator who also sat on the Supreme Court, concluded that “the power of declaring war is not only the highest sovereign prerogative; but . . . it is in its own nature and effects so critical and
calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation." 155

Referring to the President, Thomas Cooley concluded that since "the power to declare war" had been "confided to the legislature, he has no power to originate it," though "he may in advance of its declaration employ the army and navy to suppress or repel invasion." 156

Even in the twentieth century, as the nation began the process of moving away from the original understanding, the political branches continued to recognize that the decision for war had been committed to Congress. After World War I, as the nation eventually declined to join the League of Nations, Senator Henry Cabot Lodge stated "fourteen 'reservations' to the League Covenant," one of which concluded that Congress "has the sole power to declare war or authorize the employment of the military or naval forces of the United States." 157 After World War II, when the nation decided that it should be committed to the United Nations Charter, John Foster Dulles confirmed to the Senate Foreign Relations Committee that the decision for war "could not be acted upon unilaterally by the president," but would require congressional action, though he was less certain whether that action "should be by treaty or by joint resolution." 158

Professor Fisher concluded:

Presidents could commit armed forces to the United Nations only after Congress gave its explicit consent. That point is crucial. The League of Nations Covenant foundered precisely on the issue of needing congressional approval before using armed force. The framers of the UN Charter knew that history and very consciously included protections for congressional prerogatives. 159

Even the Cold War multilateral defense treaties stipulated that their provisions would be "carried out by the parties in accordance with their respective constitutional processes," 160 a provision designed to ensure the viability of Congress's war power. 161
IV. Regulating War-Making by the President

A. War-Making and Regulating War-Making

At the center of the war-initiation dispute is the difficulty that the Bush administration – and perhaps Yoo in particular – had grasping, or if they grasped it, accepting, the centrality of the Founders’ rejection of a royal prerogative and their commitment to a republican form of government. The same favoring of a royal prerogative plagued the Bush administration's analysis of Congress's power to regulate the war-time decision-making of the President as commander-in-chief. In his attempt to link America's constitutional experience under the Confederation-era state constitutions with the English division of labor as to war, Yoo pointed to the state constitutions that adopted a unitary executive as governor and underscored any rhetoric of the era that stressed the efficiency and dispatch that would advantage a unitary executive. In emphasizing language that he contends grants broad war-making power to governors as commanders-in-chief of state militias, quite astonishingly, Yoo manages to completely omit the extremely limited war-making authority granted by the Articles of Confederation to the states themselves. On the one hand, Article VI states that “[n]o state shall engage in any war without the consent of the united states congress assembled, unless such state be actually invaded by enemies. . . .” Yoo, however, failed to acknowledge that Charles C. Thach, Jr., the authority he cites, actually attributed the influence of the New York governorship on the American Constitution to James Wilson, and his impact on the convention. Thach also supplies a very standard description of the Philadelphia Convention's consideration of the war power, and suggests that as of 1923, Presidents had largely fulfilled the expectations of the framers, including their engagement in “the management of foreign affairs” and “the conduct of war.”
One of Yoo’s important historical sources, then, completely disagrees with him about the scope of executive power. And Article IX clearly states that the “united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war.”

Thus, Yoo inaccurately claims that the Confederation-era Massachusetts state constitution granted the executive “sole command over the military without formal legislative control.” He contends further that this Massachusetts Constitution contemplated executive initiative in war-making, followed by legislative and public approval. Quite apart from whether Yoo has read correctly the Massachusetts Constitution, and the arguments against ratification of its predecessor, he critically omits that Article IV of the Massachusetts Constitution empowers the legislature to “set forth the several duties, powers, and limits of the several civil and military officers of this commonwealth.” In the same fashion, while Yoo emphasizes that the New Hampshire constitution recognized a “strong executive power in war,” that constitution quite clearly limits such powers to those that can “be exercised agreeably to the rules and regulations of the constitution, and the laws of the land.” Given the presence of such provisions in the state constitutions most sympathetic to executive authority, it is completely unsurprising that the American Constitution expressly grants Congress power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”

B. Regulating the Interrogation of Enemy Combatants

In contrast to the Massachusetts Constitution’s grant of legislative regulatory authority over the commander-in-chief, Yoo’s memorandum on Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A – commonly known today as the Torture Memo– argues that there are virtually no limits to the President’s power when acting as commander-in-chief. The
Torture Memo underscored the significance of “the threat presently posed to the nation,” a threat that has led directly to “the current war against the al Qaeda terrorist network.” Yoo then contended that “the Supreme Court has recognized” that “the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces.” Thus, Yoo determined that, “the Supreme Court has unanimously stated that it is ‘the President alone [] who is constitutionally invested with the entire charge of hostile operations.’” Hence, according to Yoo and his Torture Memo, the President’s “authority is at its height in the middle of a war.” Inasmuch as the Bush administration and Yoo consider the United States to be in a non-ending war, the executive branch possesses the “royal prerogative,” under their point of view.

Yoo’s analysis has had legal implications at several levels. For one, his position argues that the statutes forbidding torture should be construed so as to avoid “serious constitutional problems.” Consequently, Yoo and the Bush administration claimed that courts should not apply the anti-torture statutes to Presidential decisions made during wartime. The memorandum summarized judicial holdings in this way: “We do not lightly assume that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander-in-Chief in the area of military operations.” The result: “In order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority.”

But even such arguments for strict construction of such statutes did not go far enough for Yoo. He also contended that even if one started with the premise that Congress enacted 18
U.S.C. 2340A with the commander-in-chief power fully considered, such legislation could not be enforced if it conflicted with “the President's constitutional authority to wage a military campaign.” 183 In a manner reminiscent of the claims of the juntas in the Southern Cone and elsewhere in South America (Chile, Argentina, and Uruguay, among others), 184 Yoo claimed that if a given action “is authorized pursuant to one of the President's constitutional powers,” particularly when it is known that “the circumstances which may affect the public safety” are not “reducible within certain determinate limits,” it follows “that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.” 185 The Office of Legal Counsel Torture Memo, thus, determined that: “In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy.” 186 It is clear that these methods included torture. 187

It may be true that Yoo's claims and actions, as well as those of others representing the Bush administration did not rise to the level of a coup, like the several “Dirty Wars,” where individuals were “disappeared,” tortured, and murdered to satisfy the military coup leaders' effort “to root out and destroy the hidden internal enemy that threatened the security of the nation.” 188 Nonetheless, much of the purpose of the Bush administration's usurpation of limitless power during “war” was an attempt fundamentally to change the United States' system of constitutional checks and balances, among other basic principles that have defined our Republic. 189 Congressional failure to challenge the arrogation of power by the executive branch and accommodation of the challenges to our constitutional republic ought to worry those who care about American values and the Republic. 190 For example, Congress proffered an amendment granting “de-facto immunity” for criminal conduct committed in the name of national security
and in defense against threats to national security. This amendment was included in the National Defense Authorization Act of 2007, and comprised one of so-called “practical solutions” to the problems created by the Bush administration.\textsuperscript{191} We hope that the Obama administration and the new Congress will rectify this and avoid the danger to our constitutional system.

Similarly, President Bush's veto of the Intelligence Authorization Act for Fiscal Year 2008, limiting torture and related tactics, defines his legacy and illustrates his administration's view of the power it wished to wield.\textsuperscript{192} Congress's acquiescence in failing to override this veto shows a serious weakness in Congress. Even Senator and former presidential candidate John McCain, himself a torture victim and long-time supporter of anti-torture legislation,\textsuperscript{193} said that "the [Intelligence Authorization Act] legislation would have limited the CIA’s ability to gather intelligence."\textsuperscript{194}

Although Congress basically acquiesced, Yoo's Torture Memo reached this ultimate conclusion:

\begin{quote}
Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. . . . It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. 
\end{quote}\textsuperscript{195}

Yoo clearly thought it to be dispositive that a President, as commander-in-chief, might determine that obtaining needed intelligence from "enemy combatants" was a crucial tactical and strategic move in fighting the "War on Terror." Consequently, the President's orders as commander-in-chief would have higher legal authority than federal legislation prohibiting torture.\textsuperscript{196}
In Yoo’s hands, the assumption that the President held “inherent” constitutional authority to initiate war was now combined with the assumption that the President holds “exclusive” constitutional authority that precludes congressional limitation or regulation. This authority is amplified when Congress clearly and definitely has authorized war. As Professor Bradley stated, most conceive that the “inherent” constitutional authority of the President simply refers to authority that the President has independent of any grant of authority by Congress. But now the President's “inherent” authority is conceived as preclusive of congressional regulation, especially when it concerns decisions about how to conduct a military campaign. While there is some historical precedent where a few leaders took this sort of view, Professor Barron and Lederman have supplied an exhaustive historical search to examine such claims in the American experience. They conclude that “there is surprisingly little historical evidence supporting the notion that the conduct of military campaigns is beyond legislative control.” Thus “the Administration's recent assertion of preclusive war powers is revealed as a radical attempt to remake the constitutional law of war powers.” Moreover, given the claim that the “War on Terror” is likely to last “indefinitely” (perhaps an euphemism for “forever”) this appears to be an attempt to create an imperial presidency.

Yoo thus manages to supply a lengthy opinion memorandum, the Torture Memo, which does not even refer to the case that many top-notch lawyers would – and do – find dispositive of the issues, albeit in opposition to Yoo's conclusion: Youngstown Sheet & Tube Co. v. Sawyer. Youngstown is famously known as The Steel Seizure Case, because President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to take possession of most of the nation's steel mills to keep them running and to prevent a proposed steelworkers’
According to Justice Black, the author of the opinion for the Court:

The indispensability of steel as a component of substantially all weapons and other war materials lead the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that government seizures of the steel mills was necessary in order to assure the continues availability of steel.

It might be possible to read Justice Black's opinion quite narrowly as holding that the President's commander-in-chief powers do not enable the President to act only with respect to "domestic questions," such as settling labor disputes or taking private property. This is the approach Yoo takes in responding to the criticism that his Memo on the President's plenary authority (January 22, 2002), did not even refer to Youngstown. According to Yoo, the case has "no application to the President's conduct of foreign affairs and national security," and related, instead, to Congress's "exclusive power to make law concerning labor disputes." When the question concerns detention and interrogation, matters that "are at the heart of the Presidents' commander-in-chief power to wage war," a "long constitutional history supports the President's leading role on such matters." Yet again, Yoo's analysis conveniently ignores the circumstances surrounding the Youngstown decision. Although Justice Black's quoted language mentions "work stoppage," the entire context and purpose of President Truman's action was the relationship of such a stoppage to matters of national security, war, and foreign affairs.

It is a vast over-simplification to reduce Youngstown to a simple-minded dichotomy between "domestic" and "foreign" affairs. Even Yoo acknowledged that Youngstown "supports the proposition that one branch cannot intrude on the clear constitutional turf of another." Congress quite explicitly holds the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," as well as "[t]o make
Rules for the Government and Regulation of the land and naval Forces; and these powers are in addition to its explicit power over war. We have already seen the important regulatory power implicit in Congress's power to declare war.

Even though one might choose to emphasize the “labor dispute” or “private property” features *Youngstown*, it is clear that “*Youngstown* has come to mean something more than this, or rather something different from this, and the concurring opinions, particularly the opinion of Justice Jackson, are generally viewed as the most important statements of the law.” Professor Lederman also reminds us that *Youngstown* “came from foreign affairs, too, and it arose in a crucial moment in American history, when a President claimed that war had changed everything and that emergency justified his actions as Commander-in-Chief.” Moreover, he observes that, if it was quite clear that the President lacked exclusive authority of the property owned by steel mills, such exclusive authority “is also unavailable . . . in a case of overseas torture.”

Professor Lederman concludes:

> We do not, in short, have a situation in which Congress has no power to legislate on the matter of captured soldiers, or on the behavior of the land and naval forces towards them. And because torture is an offense against the law of nations recognized by several international agreements to which the United States is signatory, it also has power to define and punish torture.

**C. Torture in the Guise of “Harsh Interrogation Short of Torture”**

1. **Apologists for Torture and Authoritarianism**

   At one point, Yoo actually appears to repudiate implicitly his extraordinary conclusion that federal legislation prohibiting torture unconstitutionally invades the President's powers as commander-in-chief. He poses the hypothetical problem of “a high-level terrorist leader” who is caught, and American leaders have reason to think he “knows the location of a nuclear weapon in
an American city." This – says Yoo – poses the question: “Should it be illegal for the President to use *harsh interrogation short of torture* to elicit this information?” \(^{219}\) But if anything is clear, in addition to the hypothetical being a red-herring, it is that the August 2002 Torture Memo, produced by the Office of Legal Counsel, does not assert that only “harsh interrogation short of torture” should *not* “be illegal.” Indeed, the memo's conclusion is not in any sense restricted to “harsh interrogation short of torture,” for it states specifically:

> . . . *Any effort* by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, *so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.* \(^{220}\)

Yoo all but admits that the Torture Memo's assertion was much broader than the question he poses – “Should it be illegal for the President to use *harsh interrogation short of torture* to elicit this information?” \(^{221}\) “The Torture Memo's language goes beyond Yoo's initial question regarding the use of interrogation techniques “short of torture" and implies that even the use of interrogation techniques *that are torture* are similarly unchecked by Congress.” Yoo claim rectitude in his position \(^{222}\) in his reliance on a statement attributed to Senator Charles Schumer acknowledging that few Americans “would say that torture should never, ever be used, particularly if thousands of lives are at stake.” \(^{223}\) So, despite occasionally insisting that the President’s actual orders were to ensure that even members of al Qaeda “be treated *humanely,*” here Yoo appears to endorse the idea presented in the sham of a hypothetical that “if thousands of lives are at stake,” the commander-in-chief might appropriately authorize or command the use of torture. The following, not so hypothetical, scenario shows the horridly massive breadth of Yoo's position:
Suppose that some soldiers decided that they needed to develop information on the enemy’s plans. Certainly, the enemy’s plans always include termination of their enemy’s lives. Thus, in order to save lives, the President, or his subordinates with his authority, authorizes the following: “Ten enemy combatants” are taken up in a helicopter over the sea. They are “interrogated” one at a time. When one of them fails to answer the interrogator in a manner that is satisfactory to the interrogator, that individual is thrown out of the helicopter to his death. The “interrogator” goes down the line, until he or she obtains the answer that is satisfactory to the interrogator or to those who have ordered him to do this.224

Both the conduct and the order itself would be “legal” under the Yoo and Bush administration argument. Let us add a dimension: Family members of the “enemy combatants” are taken up in the helicopter, along with the “enemy combatants.” This time, the President authorizes the soldiers or CIA agents to throw spouses, parents, and children out of the helicopter, in order to obtain a satisfactory answer from those interrogated. This, too, would be “legal” under the dystopian “system” envisioned by Yoo and Bush administration apologists.225 Indeed, their definition of torture does not limit the interrogator to inflicting harm on the “enemy combatant” alone. Anthony Lewis provides additional, and more recent, sad examples of American sadism.226

Mohammed Jawad, [an Afghan, aged 17] accused of throwing a grenade at a convoy of American soldiers in Kabul in late 2002, wounding two, was brought to the Guantanamo Bay prison camp in February 2003... In December 2003 he attempted suicide. The following May he was subjected to ...the "frequent flyer program." Every three hours, day and night, he was shackled and moved to another cell -- 112 times over fourteen days.

We know ... [this] because ... his [military] defense counsel, Major David J.R. Frakt (Air Force Reserve), ... won from a military judge an order for his jailers to produce the records of his captivity.

Fracht presented the horrors of Jawad's treatment in his closing argument at a pre-trial hearing, in a “remarkable display of legal and moral courage. ‘Why was ... Jawad tortured?’ ... ‘Why did military officials choose a teenage boy who had attempted suicide in his cell less than five months earlier to be the subject of this sadistic sleep deprivation experiment?’ Officers at Guantanamo said they did not believe he had any valuable intelligence information, and he was not even questioned during the "frequent flyer program."

... Frakt ... addressed President Bush's order of February 7, 2002, that those detained at Guantanamo as alleged al-Qaeda or Taliban members and supporters were not to be
given the protections of the Geneva Conventions... He said,

America lost ... [its] position as [the] ... defender of human rights, as the champion of justice and fairness and the rule of law....

Sadly, this military commission ... has no power to do anything to the enablers of torture such as John Yoo, Jay Bybee, Robert Delahunty, Alberto Gonzales. ..., David Addington, William Haynes, Vice President Cheney and Donald Rumsfeld....

We need to hold those who enabled torture accountable.

The sheer breadth of Yoo's reasoning in the original Torture Memo prompted Jack Goldsmith, a Bybee and Yoo successor at OLC – and, indeed the one who withdrew Yoo's August 1, 2002 Torture Memo – to argue that:

OLC might have limited its set-aside of the torture statute to the rare situations in which the President believed that exceeding the law was necessary in an emergency, leaving the torture law intact in the vast majority of instances.

Indeed, the Torture Memo does not limit itself to justifying particular "means" of interrogation because the President demonstrates that he deems that such means are essential to accomplishing the "end" of gaining critical intelligence during an emergency. Rather, Yoo's opinion contends that any attempt by Congress to set any limits on the President's discretion to determine the "appropriate" scope and techniques of interrogation of alleged terrorists prevents the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.”

Yoo thus concludes that even the existing legislation, if applied during the so-called War on Terror, would unconstitutionally invade the President's authority as commander-in-chief "to conduct warfare in a certain manner for specific goals." Similarly, Dean Harold Koh concludes that, according to the August 2002 OLC opinion, "American officials . . . can use tactics that are tantamount to torture without being held liable."
The opinion, says Koh, relies on two rationales — “that Congress cannot interfere in the President's commander-in-chief powers with regard to the interrogation of battlefield combatants," and “that anyone who carries out the President's order to torture cannot be prosecuted.” Koh sums it up: “In short, the Constitution licenses the President to be ‘torturer in chief.’”

Yoo wants to have it both ways. He has pretended that the Bush administration was loyal to America's image as a great democracy and a defender of rights even as he and the administration sought to undermine the constitutional systems of separation of powers and check and balances. On the one hand, Yoo would underscore the Bush administration's claims that it instructed United States forces to treat detainees “humanely.” Along these lines, during a briefing on June 22, 2004, then White House Legal Counsel Alberto Gonzales suggested there was no need to address to the so-called Torture Memo inasmuch as its discussion of the President's power as commander-in-chief was “unnecessary,' ‘irrelevant,' and ‘overbroad.'” Gonzales further claimed that the United States intended to follow its treaty obligations and United States law, both of which prohibit the use of torture. Gonzales’ claims were made with knowledge of the torture that was occurring. The denials, excuses and obfuscation of the Bush administration, including Yoo and Gonzales, tend to prove their mens rea. Of course, we know and have shown herein, that the claim to authoritarian power at the mere word of the President that he is acting pursuant to his commander-in-chief authority, is not a defensible position. This tendency to exaggerate and function in a realm of mythical archetypes plagued the Bush administration's efforts to justify even a relatively narrow construction of the nation's obligations and efforts to address the rich problems related to torture, cruel, inhuman, and degrading treatment of detained individuals.
For example, in 1994 the United States Senate gave its Advice and Consent to the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), an international treaty designed to protect any individual detained by any government. CAT expressly states that the parties to the treaty shall “undertake to prevent . . . other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.”

President Reagan, in his transmission letter to the Senate of CAT, sought and the Senate attached, among other reservations, a “reservation” stating that “those terms” (cruel, inhuman, and degrading) are “coextensive with the prohibitions in the Fifth and Eighth Amendments to the U.S. Constitution.”

Professors Cole and Lobel observed, however, that when the Senate was considering whether to confirm Alberto Gonzales as attorney general, it learned that Bush administration officials had secretly drawn a different lesson from the reservation to the CAT. They interpreted it, Gonzales explained in response to a senator’s question, to deny foreign nationals being held abroad any protection from “cruel, inhuman, and degrading treatment.” The administration's reasoning was that because the U.S. Constitution itself has not been generally interpreted to extend to foreign nationals outside our borders, and the prohibition on “cruel, inhuman, and degrading treatment” was coextensive with the constitutional provisions, that part of the CAT did not protect foreign nationals held abroad.

Cole and Lobel then quoted a letter from Abraham Sofaer, the former Legal Adviser to the State Department during the Reagan Administration who presented the CAT to the Senate, on behalf of President Reagan, who contended that “[the Bush administration] reasoning is fundamentally inconsistent with the basic premise of the treaty, which is to protect the human right to be free from torture, not the American right to be free from torture, or the right to be free from torture only in the United States.” Sofaer's letter concluded: “The administration's
interpretation gave U.S. officials a green light to use any tactic short of outright torture, no matter how cruel, inhuman, or degrading, to interrogate foreign nationals detained outside U.S. borders.\textsuperscript{246}

Ironically, however, insofar as the relevant treaties implicate and incorporate \textit{jus cogens} principles and customary international law, President Bush's statement that the United States does not torture functions as an acceptance of those binding principles and customary rules and is evidence of guilt, as torture and other crimes against humanity were ongoing. Bush's statement, sadly, is similar to Joseph's Göbbles statement in an article he wrote on May 28, 1944, in the \textit{Voelkischer Beobachter}, the official Nazi publication, in which Göbbles claimed that the Third Reich followed international law and "usage of warfare." He wrote:

\begin{quote}
...[I]t is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare. ...\textsuperscript{247}
\end{quote}

The quote also implicitly condemns those who issue the orders, as evidenced by the Nuremberg convictions.\textsuperscript{248} Nuremberg Charter, Article 7, emphasizes this point: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."\textsuperscript{249}

This is not to claim that Bush and Göbbles are equivalents, but to indicate they each condemned themselves and their regimes by their statements of denial. Their very statements doom them. This includes their denials, attempts to obfuscate the truth, and other conduct that indicates that they know their (hidden or denied) acts and orders are illegal. The Bush administration and Yoo might argue, if they actually knew history, that the Nuremberg Judgment did not hold the major war criminals guilty of the crimes they committed prior to 1939, because
no “war” had broken out at the time. This point, not really necessary even at the time, became irrelevant in the subsequent trials under Allied Control Council Order No. 10, where individuals were convicted of crimes against humanity committed prior to 1939, for the Allied Control Council Order did not contain the restriction. Both the conduct and the orders authorizing torture and other crimes against humanity clearly are crimes under international law and the domestic law of virtually all countries. Does anyone question that the torture, disappearances, and murders committed under the “authority” of the President Bush, the Justice Department, the Defense Department, and the White House memoranda of “law” would be considered quintessential crime, if committed against U.S. citizens? A discussion of the nature and quality of customary international law, which establishes the criminality of this conduct, whatever the claims of Yoo or the Bush administration, is presented in Section V, below.

2. Yoo, Gonzales, the Secret War Council and Torture.

In a recent book, Yoo attempts to defend the same basic position adopted by Gonzalez in which Gonzalez argued that CAT did not apply to foreign detainees. However, we have shown that Yoo applied a slightly different line of argument. Yoo found it crucial that “the central international treaty on the subject makes a clear distinction between torture on the one hand, and harsh measures characterized as ‘cruel, inhuman, or degrading treatment’ on the other.” He then underscored the fact that “CAT required states to criminalize only the former [torture] – not the latter [cruel, inhuman, or degrading treatment].” Further, Yoo defined torture in such an absolutely and absurdly narrow way that it would allow for most forms of torture, much of which the United States has prosecuted. For Yoo the absence of a “
criminalization requirement" serves to justify reading the "treatment provisions" – those requiring member states to "undertake to prevent" acts that constitute "cruel, inhuman, or degrading treatment," but which still "do not amount to torture" – out of the treaty completely.

He thus concluded:

The Reagan administration made clear that the treaty did not regulate all forms of mistreatment, which, below the level of torture, would remain the domain of American law. It reported to the Senate: "Rough treatment as generally falls into the category of ‘police brutality,’ while deplorable, does not amount to ‘torture.’ And Congress completely agreed."255

In addition, to sustain this argument, Yoo had to define torture so narrowly that it had to rise to the level of "[p]hysical pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."256

When Senator McCain concluded that the Bush administration chose to ignore the nation's treaty obligations, he proposed a law that explicitly prohibited the use of cruel, inhuman, and degrading treatment by agents of the United States, no matter who was being interrogated.257 The proposed law was enacted despite threats of a veto, as well as efforts to exempt CIA agents interrogating foreign nationals abroad.258 Ultimately, President Bush signed "The McCain Amendment" into law259 but he included a "signing statement" that clarified his intention to construe the legislation as “consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander in Chief.”260 Even when Congress deliberately bypassed the administration's misreading of the nation's treaty obligations by clarifying, reaffirming, and even criminalizing violation of the legal duty of American officials to avoid "cruel, inhuman, or degrading treatment," President Bush remained insistent that he was entitled to order or authorize such treatment by United States agents.
Equally significant, under the interpretation of Bush administration officials, international bodies, such as the International Committee for the Red Cross (ICRC), which decline to adopt the Bush administration's readings of the nation's treaty obligations, are necessarily acting in bad faith and not living up to their responsibility "as a neutral intermediary in wartime." Specifically, Yoo objected that the ICRC report on Guantánamo Bay criticized the interrogation conducted there as "attempting to gain intelligence by breaking the 'will of the prisoners' and making them 'wholly dependent on their interrogators.'" Yoo observed that the report "did not say that any particular interrogation method constituted torture, but instead that the whole system of gaining intelligence was cruel, unusual, degrading treatment that amounted to torture." But if this were true, Yoo contended, "then virtually all interrogation is torture and illegal, including what goes on in U.S. police stations every day." Today, of course, Susan Crawford, Chief Prosecutor for the Military, admitted that the techniques applied were torture.

But if "cruel, inhuman, or degrading treatment" includes all treatment that would violate American constitutional limits on interrogation, it is difficult to conclude that the ICRC report is out of line. A traditional formulation of the Supreme Court's Due Process "voluntariness" test asks whether a confession was the product of a system designed to "break the will of the prisoners." In 1949, in *Watts v. Indiana*, the Court concluded that "[w]hen a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary." Without question courts have sometimes emphasized the "severe brutality" of interrogating officials, or
occasionally the deprivation of sleep or food. But *Watts* clarifies that the voluntariness test required by the Due Process Clause does not demand a showing of any sort of severe brutality. At any rate, it is clear that the totality or combination of other “techniques,” including, sensory deprivation, sleep deprivation, exposure to extreme temperatures, use of stress positions, sexual abuse, forced nudity, object rape, and threats with military dogs, can be described as nothing but torture, as recently admitted by Susan Crawford, Chief Prosecutor for the Military.

Even more recently, in *United States v. Rutledge*, the Seventh Circuit acknowledged that in the federal judiciary the “voluntariness” test has come to focus less on the extent of the “free will” demonstrated by the confessor and more on the nature of police behavior yielding the incriminating statement. The question has become whether “the government has made it impossible for the defendant to make a rational choice as to whether to confess.” If law enforcement has “made it impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time,” as for example by feeding him “false information that seriously distorts his choice, by promising him that if he confesses he will be set free,” it may well be that “the confession must go out.”

D. The U.N. Committee Against Torture's (UNCAT) Critique of Guantánamo

Following his objections to the ICRC report, Yoo argued that “[a] politicized UN followed in the ICRC’s footsteps.” The UN’s Committee Against Torture “issued a May 2006 report demanding that the Guantánamo facility be closed.” Set up to observe compliance with the Convention Against Torture, UNCAT objected that Guantánamo detainees were being held for protracted periods, lacked legal limits on detention, and were not subjected to any assessment of
the legal justification of their detentions. Whatever merits there may be to criticisms of the UN's Committee Against Torture, the evidence is extremely strong, if not overwhelming, that the United States has fallen well short of living up to its international obligations under The Convention Against Torture.

Professor Pearlstein observes that there are now hundreds of officially documented incidents of torture and abuse in U.S. custody since 2002, only a fraction of which occurred at Abu Ghraib. Among the most troubling statistics is the Pentagon's documentation of more than two dozen homicides in U.S. detention facilities worldwide since 2002 (only one of which was at Abu Ghraib), including at least eight individuals who were tortured to death.

The documented abuse grew not only from “direct executive authorization,” but from “knowledge of wrongdoing coupled with failure to correct and punish”, as well. Further evidence of this is presented in Section V, below.

It is shocking that these post-9/11 times have prompted an actual debate over the necessity and value of utilizing torture – or at least “harsh interrogation short of torture” – for good ends, such as trying to ensure the safety of the American people. Some Americans may have difficulty accepting the reality that “[t]orture is a prescription for losing a war for support of our beliefs in the hope of reducing the casualties from relatively small battles.” Whatever its implications for the rhetorical war involved in fighting the ideological battle against terror, the proposition that “torture should remain illegal under all circumstances and victims of torture should have a full array of available remedies” is paramount for our morality to be maintained and for our constitutional republic to survive.

V. Consequences: Torture and the Evisceration of Morals, the Rule of Law, and the Constitution
We have shown that Yoo's outrageous claims, including claims supposedly based on the Framers' position on the Presidential War Power, are wrong on the facts. His position appears to be both an apologia for the creation of an imperial presidency or an authoritarian regime, as well as an attempt to avoid accountability. Yoo and the Bush administration claimed that the “War on Terror” is going to continue indefinitely. Thus, the arguments Yoo and the Bush administration set forth, which even they must admit operate only in times of war, are designed to be virtually permanent. Moreover, the attempts of the Bush administration to “justify” torture, including its acceptance of Yoo's Torture Memo and other memoranda, are proof of aiding and abetting torture and other brutal crimes. Moreover, these “justifications” also are evidence of command responsibility and conspiracy to commit the crimes of torture, murder, and disappearances, among other atrocities. The Bush administration, Yoo, and other perpetrators of those crimes ought to be brought to justice. One day, perhaps, they will. Some, whom we know understand the atrocity in which they were (unwillingly?) a part, may find a way to repudiate their actions and finally assuage their consciences. In the meantime, torture, disappearances and similar terroristic barbarity continues.

The following discussion provides some detail on international criminality of the Bush administration's conduct. First, we discuss the nature and authority of customary international law, including the principle of *jus cogens* (compelling law). Next, we explain why challenging this atrocity is important to each of us individually, to the world community, and to the future of our constitutional republic.

A. Customary International Law & Promulgative Articulation: Why and How the Bush Administration's Conduct, Including Torture, Violated International and United States Law
The Bush administration's conduct described herein, including torture, violated international law and United States law. This article demonstrates the weakness of the Bush administration's pretense that the Constitution authorizes authoritarian executive power, when the President claims the need for it as commander-in-chief. We have shown how this position violates the Constitution. Torture, disappearing people, and other conduct also violated treaty obligations and customary international law.

Customary international law is binding in the international arena and in most countries, including the United States. The United States, and some other countries, however, limit the extent of its domestic binding authority. In the venerable *Paquete Habana* decision, Justice Gray put it this way:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depend upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ...

It is clear from the opinion and the evidence accepted that the Supreme Court of the United States accepted customary international law as the law of the land.

Customary international law is viewed, traditionally and correctly, as law promulgated on the basis of general or consistent state practice (the material element) and *opinio juris* (the subjective or psychological element). *Opinio juris* is established when one proves that a state acts or fails to act in a certain way because that state considers itself legally bound so to act or not to act. Some commentators have argued that *opinio juris* is deeply flawed and ought to be eliminated, because international courts often accept the existence of a rule of customary international law based solely on state practice. This view, however, is flawed. It is not surprising that proof of a person's or a nation-state's government's sense of legal obligation is
inferred from facts or conduct. This is evidence of *opinio juris* and establishes the "subjective element" of conduct. In criminal law, *mens rea* often is established by the individual's conduct, not by penetrating the individual's internal thoughts or desires. Just because an element is inferred by actions does not mean that the element doesn't exist or wasn't proved.

Even negative conduct, such as secretly taking action contrary to a customary international rule of law may create or prove customary international law. On the other hand, such negative conduct may erode customary international law, general principles, or the intended meaning of a treaty provision. For example, the definition of torture in Yoo's infamous Torture Memo was used by Chuckie Taylor, the torturing son of the Liberian dictator and *genocidaire* in his defense. Taylor's attorneys argued that the law requires a higher level of pain that ordinarily is associated with death, organ failure or serious impairment of body functions," the definition used in the Yoo Torture Memo. Certainly, subsequent practice of parties to treaties, even relating to non-parties, may create customary rules that impact interpretation of treaty terms.

In contrast, negative conduct also may prove the validity and continued legality of those terms and the underlying custom, through negative implication. For example, when the Bush administration authorized torture, while denying it, their very denial confirmed their culpability. Another example is when the administration inventively formed its so-called Article 98 agreements (intended to "immunize" any U.S. national from being sent to the International Criminal Court), the administration inadvertently recognized the legitimacy of the ICC. When the government feels it is necessary to try to immunize its officials through denial or hiding the
truth, or by intimidating treaties, it indicates an implicit recognition that the conduct of those who may need “immunizing” was criminal.

Scholars differ on the impact or authoritative status of customary international law. For example, Professor Anthony D'Amato suggests that nations are obliged by international law as an entire system, without the freedom to opt out of a particular law not to their liking, although many nations opting-out may erode and change a rule.297 Professor Jonathan I. Charney agrees with Professor D'Amato's argument that nation-states are not free to opt out of customary international law, as the persistent objector rule “is open to serious doubt.”298 Others argue that state consent is the basis of international law and, if a country objects to a rule as it is becoming law and persistently continues to object, the objecting nation is not bound.299 We agree with Professors D'Amato, Charney, and others who have shown that customary international law is law, not mere usage or practice. States may not just “opt-out.” They may refuse or fail to obey, but disobedience simply violates the law. The violator is accountable in the international sphere. A large number of violations over time may end up changing the violated customary law; but until this evolution amends or eliminates the law, a violation is a. Those who argue for the persistent objector opt-out, seem to suffer from a misunderstanding of the nature of customary law, which is common in the common law world.300 Customary international law is different from common usage or practice. Customary law is part of the civil law tradition (which evolved out of Roman Law), was adopted by public international law, and continues to have many attributes of a civil law system.301

One of the most distinguishing features of the civil law, at least viewed by most jurists, is the hierarchy of authoritative and persuasive sources.302 Civilian doctrine and law provide that
"legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages [what common law states call practice or usage – and, sometimes, custom], and equity, that may guide the court in reaching a decision in the absence of legislation and custom." Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. This is customary law, an authoritative or primary source which was adopted by public international law.

Thus, while the idea of the so-called "persistent objector" may end up changing the law, until that law changes, the objector is no more than a persistent lawbreaker. The status of "law violator" may be required by the violator's domestic legal system, depending on the state's incorporation of the rule, but is clearly a violator of the law in the international legal system.

B. Propagandistic Appropriation of the Rule of Law, Terms, Values and the Constitution: The United States, Terrorism and Torture

Michael Ignatieff wrote: “we need to widen out our reflections, think about the moral nihilism of torture and why–this is the most painful question–torture remains a temptation, even a supposed necessity, in a war on terror.” Ignatieff continued, “[torture] when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'être is the control of violence and coercion in the name of human dignity and freedom.” The moral nihilism of torture is revolting, yet the Bush administration, functionally “legalized” torture by its absurdly narrow definition and its usurpation of authoritarian executive power. Law, the Constitution and our morality are perverted to accommodate our government's moral nihilism. Those who make
the decision to violate our values in the name of “security,” “anti-terrorism,” or “democracy” must not be allowed to devalue our law, the Constitution, and our morals by being given impunity. The Obama administration has an obligation not only to reverse the nihilism of torture and similar atrocities, but also to allow prosecution of those who have committed these crimes.

Professor Dershowitz may be correct that torture always will occur in perceived emergencies. That platitudinous suggestion is like saying that crime is always going to occur. But if we allow members of the Bush administration to get away with it or allow Congress or our judiciary to be complicit in torture or terrorism, we enshrine that conduct as “legal” and implicitly recognize the attempted arrogation of power. To do this negatively represents our character as individuals and the quality of (or diminution of) our constitutional system. Justice Jackson's dissent in the *Korematsu case* captured this sentiment in his quotation of Cardozo's aphorism: “[a]n enshrined rule" will “expand to the limits of its logic.”314 The Bush administration's “disappearing” people, torture and other atrocities, including holding many without charges or any due process, brings us to the precipice of repeating one of Justice Jackson's important aphorisms, stated in his opening remarks at the beginning of prosecution at Nuremberg: “[t]o pass these defendants a poisoned chalice is to put it to our own lips as well.”315 Thus, allowing torture in our name is a matter of principle, morality, constitutionality, and legality. It reflects our standards and tells us and others who we are or what we have become.316

Torture and terrorism are criminal and must be treated as such. To do otherwise is similar to the idea of self-justified self-defense: one cannot use one to justify the other, without untoward consequences. Terrorism begets torture; torture begets terrorism – so goes the evil miasma. If the logic of self-justification is allowed to work, terrorism may be used to justify torture (as Yoo
arguably has done) and torture used to justify terrorism (as other terrorists arguably do). This obviously undermines the rule of law. To pretend there is a justification of either is dangerous, wrong, and self-destructive on every level. Claims of "justification" are based on the most faulty of premises and on disingenuous readings of the Constitution and history.  

The infamous Torture Memos, written by Justice Department lawyers, empowered virtually as "law" similar to Attorney General Opinions, served as a functional green light and an attempt to establish impunity for torture and murder. The memoranda were written in secret, with the hope that they would never see the light of day. Fortunately, a few memoranda have come to light; more will certainly be forthcoming. Much of the claim for the challenge to American values and to the Constitution were manifest in the context of trying to justify the power to torture. This, in turn, was rationalized on the basis of a faulty, misleading and fictional scenario having virtually nothing to do with reality: the so-called ticking-time-bomb scenario. As David Luban has explained, the excuse for the torture, some of which led to murder, is "simply a fraud," which influences people due to simplistic belief in fictional movies or television programs, such as 24 Hours:  

[The scenario] is fictitious, because it assumes, or stipulates, a wildly improbable set of facts: that we know that there is a ticking time bomb, that we know the time is short, that we know we have the right person, that we know he knows where the bomb is, that we know he won't talk under humane interrogation, and that we have good reason to believe that he will talk under torture, rather than lying or holding out until the bomb goes off--or passing out or dying. We also know that the torturer is not a sadist or a brute, and that this case is an exception to an anti-torture rule that the interrogator, who is no sadist or psychopath, basically accepts. All these assumptions are, of course, deeply questionable.  

Jean-Paul Sartre represents many, including the Bush administration (which would likely either not know that it conformed to Sartre's "ethic" or would try to pretend that they did not
adhere to it), who have justified “any means necessary,” such as violence against innocents. Sartre argued that any people not engaged in fighting the adopted cause were enemies, hence, the equivalent of aggressors, terrorists, or oppressors, deserving no quarter. Camus correctly rejected this ethic to the extent that it finds virtue in slaughtering innocents, applying the death penalty, or torturing anyone, even for a supposedly just cause. One can defend the oppressed and the innocents of the world, without destroying other innocents or violating one's own humanity. The same applies to the so-called “War on Terror” and the concomitant attempt to erode constitutional checks and balances and the rule of law.

The established clichés or the “ethic” of public order based on terror lead ultimately to a moral and legal abyss. Oppression, torture, terrorism are of a kind. Statists who seek to maintain or expand their power mirror the power-seeking terrorists by demonizing, torturing, and killing so-called “others.” The oppression and exploitation of human beings to accommodate one's material, political, or military interests, even if disguised in some high-sounding abstraction, are terroristic in nature. The oppression noted in the preceding sentence is terrorism. Terrorism is torture and torture is terrorism. In the end, self-justification, denial, and self-delusion allow perpetrators, including the policy makers, to feign justification for their vengeance and their attempt to expand their power. Oppression, torture, and terrorism continue the frightening cycle of tyranny, evil, and death that we passively have allowed to be perpetrated by our government (or our “leaders,” if they form part of a group that uses terrorism, torture and the like to gain power). Our obligation as human beings and citizens of this Republic is to fight passionately to prevent such atrocity from continuing.

Sartre is correct in some ways and incorrect in others. He was right that oppression is a
form of terrorism, even torture. But he went too far, arguing that a war of national liberation, “
 once begun...[should give] no quarter.” Propaganda calling for a “Holy War” against Western
decadence is a manifestation of the same miasma of evil. Intentional or reckless killing of
innocents in any conflict is criminal, whether done by states or any other group, even if it is
deemed justifiable or acceptable for a “just cause.”

This attitude is especially troublesome, when aimed at manipulating a people into
accepting unending conflict and the use of “any means necessary” to fight it. President Bush
adopted unending conflict as a means to arrogate power to the presidency. He called for a so-
called “War on Terror,” which he wanted to be continual, unending, and would require all our
devotion, including acceptance of the evisceration of the constitutional values for which he
claimed we were fighting, as well as any conduct that the President deemed “necessary.”

version of a modern-day “Holy War.” If both sides believe in an ongoing, unending war for
survival against “evil-doers,” then the result is total war, in all its horror. Values, human rights,
morals, and civil liberties are sacrificed, along with people. It is becoming clear what we will
accommodate atrocity when we fear continually and remain in a state of constant emergency.
What are we willing to become? Is it far-fetched to compare the “Crusade” against Islam during
the Middle Ages with the marketing of a “clash of civilizations?” A fight put in terms of one for
survival, even one for gaining or retaining power, may cause people to do unspeakable things.
But the law, morality, and our Constitution does not justify, excuse, or accommodate “any means
necessary.” It is not morally or legally justifiable to kill innocents, to torture, or to arrogate
absolute power, regardless of how effectively it is perceived to be or how much it is claimed to
intimidate others.
Terrorism and the United States’ current response to it are often of one cloth. Simone Weil and Thomas Merton were not far off in expressing this, as they described a great beast, which is the urge to collective power, “the grimmest of all the social realities.” They said, aptly, that this lust for power is masked by the symbols of “nationalism, fundamentalism, capitalism, fascism, [and] racism.” We would add to this list perversions of religion, morality and values, including sovereignty, self-determination, liberation, revolution, freedom, democracy, and national security, which often is “a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so.”

Xenophobia and insecurity are fostered by manipulating a people's sense of community, ethnicity, heritage, nationalism, or religion, and by causing fear that these are at risk. Leaders use this fear to cause their followers to commit or acquiesce to unspeakable acts. It is important to explode the myths used to foment violence or terrorism and crimes against humanity will be the “norm.”

C. Officials of the Bush Administration Must be Held Accountable

Terrorism, including torture, poses a vicious threat to life, peace and human dignity, but the ordinary person may be capable of overcoming the manipulation that prompts participation. We believe that human beings have a common core of values that allows them to recognize these crimes and condemn them. We humans condemn easily, when these crimes are committed against us. We - all of us, no matter what “group” or country to which we belong - need to instill the vision and fortitude to recognize and resist when “our leaders” or compatriots commit those atrocities against “others.”

Terrorism, including torture, is condemned—it is criminal—whether committed by states against their own inhabitants or against “others,” whether it is committed internally or
extraterritorially. It is criminal whether perpetrated by insurgents, or those struggling for independence or freedom from oppression. Individuals are responsible when they commit these offenses or cause their people to commit them. Individuals even when functioning in their official governmental capacity, are subject to law and may be punished for committing or aiding and abetting the criminal conduct analyzed herein. Impunity must be eliminated. As the Tribunal at Nuremberg provided:

... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... The very essence of the Charter is that individuals have international duties that transcend the national obligations of obedience imposed by the individual State...."338

We need to prosecute atrocity, including torture and terrorism. If prosecution is to occur, the elements of the offenses must be clearly established. Thus, this criminal conduct we call terrorism includes: (1) violence committed by any means; (2) causing death, great bodily harm, including psychological trauma caused by making a person fear such harm; (3) to innocent or defenseless individuals, including those hors du combat; (4) with the intent to cause those consequences or with wanton disregard for those consequences; (5) for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, or other philosophical benefit. Torture fits this definition.

Human rights protections for victims and the accused must be clarified and vigorously maintained. To date, this has not been done well in treaties, statutes, or in executing provisions of treaties or statutes. Customary international law and jus cogens principles, manifest in international law and the domestic laws of virtually all nations, provide the needed clarity and specificity. The penal codes of all nations and the customary rules of groups everywhere, condemn intentional killing or maiming without justification or excuse. There simply is no
excuse for torture or killing and maiming innocents.

The arrogant, self-rationalized-justifications, “excuses,” and rationalizations given by those who commit atrocity like terrorism or torture, and their apologists are frighteningly familiar and ring hollow.339 For the good of our constitutional republic and the world, care must be taken to ensure that international and domestic action to obtain justice takes place, including prosecution of perpetrators and their principals, in a manner consistent with human rights and due process. We must prosecute and take other necessary action with vigor, taking care that we do not fall into the same trap that ensnared those who committed the crimes.340

VI. Conclusion

Leave truth to the police and us; we know the good;
We build the Perfect City time shall never alter;
Our Law shall guard you always like a circue of mountains
Your ignorance keep off evil like a dangerous sea341

The Bush administration found a way to self-rationalize their “legalization” or “justification” of illegitimate and unjustifiable atrocity, including torture, in its effort to arrogate power to the executive branch, especially to the President. We delude ourselves when we think that terrorism is committed only by our “enemies.” When we allow ourselves to torture (itself a form of terrorism) and commit other atrocities in the guise of “fighting terrorism,” we weaken ourselves and become that which we claim to be fighting. Despite Yoo's and the Bush administration's predilections and conduct, it will not do to define or characterize illegal war, terrorism, counter-terrorism, or torture on the basis of the end sought. The former President claimed that he was “fighting terrorism,” or acting in “self-defense.” Simple self-rationalization does not mean that Bush and his administration did not commit international and domestic crime, even
state-terrorism. When we commit these atrocities, we commit terrorism.\textsuperscript{342}

The pathetic, self-rationalized “legal and moral justifications” to “do whatever it takes” to fight for a pretended just cause or against terrorism or, on occasion, imagined terrorism, to the manifestos and self-righteous calls for vengeance, many of our counter-terrorist measures led to actions that bore their own sickening resemblance to terrorism. Bush administration officials, apparently were willing to justify, excuse, or ignore conduct that is morally repugnant, illegal, and dangerous to their country's own interests. In fact, some legislators, judges, scholars, pundits, and many work-a-day people acquiesced.

Leaders sometimes foster a willingness in their people to commit atrocity, to acquiesce to it, or to allow refuge or impunity to those among them who commit it or to the leaders who foster it. We have focused on the United States, because it is our beloved country, where we live and work, but the phenomenon occurs in many places. We wish to prompt the Obama administration to go beyond its repudiation of the policy and conduct and to render accountable those who committed these domestic and international crimes. We retain hope that it will live up to its own standards and remain the constitutional republic intended by the Founders. We feel an obligation to ourselves, to our sisters and brothers in the United States, to the world community, and to the Republic itself to say so.

Using torture, disappearing people and related crimes against humanity, forms of terrorism themselves, to “fight” terrorism, makes us terrorists.\textsuperscript{343} The use of and acquiescence to torturing people presents a classic example of fear-mongering to foster panic run amok, used as a blatant attempt to reverse the constitutional separation of powers and checks and balances. Terrorism provided the perfect excuse to blind the people of the United States to the evisceration of these
and other invaluable (inalienable) constitutional rights and principles. Many succumbed to the administration's manipulation of the fear of terrorism, and acquiesced to the erosion of morals, our constitutional system, the rule of law, and compromised their own sense of right and wrong. We lose our moorings when we descend to the level of simple vengeance, or become so fearful and overwrought that we commit or condone such atrocity. Thus, terrorism and counter-terrorist overreaction strains the core of our constitutional republic. Some professed libertarians have argued that abuse, even torture, is appropriate, acceptable, or inevitable under extreme circumstances. Sadly, abusers and torturers appropriated the power to abuse and torture. Governmental overreaction and criminal abuse at home and abroad, claiming “justification” upon rhetoric of fighting terrorism, providing security, or protecting “the homeland,” actually eroded security, democracy and constitutional liberty. Needless to say, it eroded everyone's morality. Although the Bush administration had never heard of (or ignored) Justice Jackson's poignant warning at Nuremberg, the rest of us must not. To allow ourselves to accommodate or give impunity to those who act on simple vengeance, commit terrorism, torture and similar atrocity, because of our fear or insecurity, or because we buy the claim that it is for “fighting terrorism” or fighting for “freedom,” we and our Republic are lost. We must remind ourselves of John Milton's poignant warning:

“So spake the Fiend, and with necessity.
The tyrant's plea, excus'd his devilish deeds'
and it is still the shibboleth of the descendants
of the Prince of Darkness.”

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Professor of Law, University of Nevada Las Vegas. Professor McAffee would like to thank his research assistant, Tyler Watson.


2 In June of 1968 Senator Kennedy was assassinated; with President Bush being a two-term President. No doubt, the Iraq war had significant impact on the 2008 election.


5 While in law school, Professors Blakesley and McAffee both served, at different times, as a research assistant to Professor Ed Firmage. Much of our work contributed to what eventually became a book analyzing constitutional war powers. See Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law (2d ed. 1989) [hereinafter To Chain the Dog of War]. Despite teaching law for twenty six years and thirty years, respectively, with constitutional law being Professor McAffee's and
International Criminal Law being among Professor Blakesley's main scholarly interests, this is our first attempt to examine in detail the constitutional allocation of war-making decisions in any systematic and fairly complete way. (← this sentence is awkward. Consider: “Professor McAfee has taught law for twenty-six years with a focus on constitutional law. Similarly, Professor Blakesley has taught law for thirty years with an interest in international criminal law. Despite our extensive careers, this is our first attempt to examine in detail the constitutional allocation of war-making decisions in any systematic and complete way.” For a succinct summary of conclusions Professor McAfee previously has reached as to the relationship of Congress and the President on decisions as to war, see Thomas B. McAfee, *Originalism and Indeterminacy*, 19 Harv. J. L. & Public Policy 429, 432-34 (1995). For Professor Blakelsey's previously reached conclusions on terrorism and torture, see, among others, Christopher L. Blakesley, *Terrorism and Anti-Terrorism: A Normative and Practical Assessment* (Martinus Neihoff 2007) [hereinafter terrorism and anti-terrorism]; Christopher L. Blakelsey, *Ruminations on Terrorism: Expiation and Exposition*, 10 New Crim. L. Rev. 541 (Cal. Berkeley Press, 2007) [hereinafter *Ruminations on Terrorism*].

6See, e.g., David Gray Adler, *The Constitution and Presidential Warmaking*, The Constitution and the Conduct of American Foreign Policy 183, 184 (David Gray Adler and Larry N. George eds. 1996) [hereinafter *Presidential Warmaking*] (despite searching "the historical records for discussion of these questions in the Constitutional Convention and in the early years of the republic," clearly "the questions have lingered in a state of confusion. . ").

7For post 9-11 critical works on war powers, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb ~ A Constitutional History*, 121 Harv. L. Rev. 941 (2008) [hereinafter *A

8 See generally Louis Fisher, Truman in Korea, in The Constitution and the Conduct of American Foreign Policy 320 (David Gray Adler & Larry N. George eds. 1996) [hereinafter The Conduct of American Foreign Policy]. Professors Adler and George had earlier offered the observation that “no president claimed the constitutional power to commence war until 1950, when Harry Truman asserted the authority to plunge the United States into the Korean War.” David Gray Alder & Larry N. George, Introduction, in The Conduct of American Foreign Policy, supra, at 8. Truman not only “claimed unprecedented unilateral authority to commit our troops to combat (and keep them there long after there was opportunity for congressional consideration) but even went so far as to suggest that Congress lacked authority to stop it.” John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath 10 (1993) [hereinafter War and Responsibility].

9 Fisher, Truman in Korea, in The Conduct of American Foreign Policy, supra note 8, at 326 (noting that “[w]ith the Soviet Union absent, the Security Council voted 9 to 0 to call upon North Korea to cease hostilities and to withdraw
their forces"; even so it was two days later that the Council “requested military assistance from UN members to repel the attack, but by then Truman already had ordered U.S. air and sea forces to assist South Korea.”). See also Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, and Sharon A. Williams, The International Legal System: Cases and Materials, 1047-48, 1069-72, 1088 (5th ed. 2001) [hereinafter The International Legal System].

Andrew Rudalevige, The New Imperial Presidency: Renewing Presidential Power After Watergate 50 (2005) (“Truman not only refused to ask for congressional authorization for his action but refused a resolution when it was offered; he felt, as Secretary of State Dean Acheson put it, that to seek legislative support would weaken the presidency by setting a ‘precedent in derogation of presidential powers to send our forces into battle.’”).

When, in 1950, the nation committed itself to a massive standing army and to a worldwide network of mutual-defense treaties, the wraps on presidential warmaking came off.” Donald L. Robinson, Presidential Prerogative and the Spirit of American Constitutionalism, in The Conduct of American Foreign Policy, supra note 8, at 114, 128. The consequence was that whereas Korea might have reminded us that the Constitution's “distribution of the war powers erected mere 'parchment barriers' against presidential prerogative,” and thus renewed our commitment to congressional control over the war-making decision, in the years since Korea, we have in effect granted, “in de Tocqueville's phrase, ‘almost royal prerogatives.’” Id. at 128.

Charlie Savage observes that, even as “some in Congress proposed repealing the Tonkin Gulf Resolution,” President Johnson “said he had the inherent power, as commander in chief," to act “to defend America against a threat to its national security.” Charlie Savage, Takeover: The Return of the
Savage thought it significant that Nixon “refused to acknowledge a role for Congress in deciding when to withdraw from the war, saying such issues were for him alone to decide. Congress repealed the Tonkin Gulf Resolution in 1971, for example, but Nixon kept the war in Vietnam going until 1973.” *Id.* at 22.

Nixon argued that “I don't think you should restrict the president’s authority to deploy military forces because of the Vietnam experience.” Perhaps unsurprisingly, one of the strongest opponents of the War Powers Resolution was Dick Cheney, who perceived the War Powers Resolution era “as the 'low point' of presidential power.” *Id.* at 26.

But was it wise for Congress to pass legislation requiring congressional authorization before the executive could make war? The perceived need for such legislation may create an impression in some that the Constitution, of itself, does not “require” such congressional approval. Perhaps this is not the case, but the question is raised, at least.

John C. Yoo, *Memorandum Opinion for Timothy Flanigan, the Deputy Counsel to the President, Sept. 25, 2001, in The Torture Papers: The Road to Abu Ghraib 3* (Karen J. Greenburg & Joshuas L. Datrel, eds. 2005) [hereinafter The Torture Papers]. Yoo was an assistant to Jay S. Bybee, chief of the Office of Legal Counsel, U.S. Department of Justice during this time and is currently a Professor of Law, Boalt Hall School of Law, University of California, Berkeley. Former Deputy Assistant Attorney General, Office of Legal Counsel, U.S.
Department of Justice. Yoo served the Office of Legal Counsel as an assistant Attorney General from 2001 to 2003.


The Torture Memo's vehicle for this attempt to expand executive power was torture. Yoo tried to establish an absurdly narrow definition of torture and that the President could authorize it anyway. The claimed authority for the niggardly definition was medicare reimbursement statute and was not about torture at all. See Kathleen Clark, Ethical Issues Raised by the OLC "Torture Memorandum," 1 J. Nat'l Security L. & Pol'y 455, 457-58 (2005) [hereinafter Ethical Issues], also discussed in Philippe Sands, Torture Team: Rumsfeld's Memo and the Betrayal of American Values (2008) [hereinafter Torture Team]; Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals (2008); at 179-180 [hereinafter The Dark Side]. The discussion on torture and executive power is developed further in fn. 240 and accompanying text. On the extremely narrow definition of torture, see Manfred Nowak, What Practices Constitute Torture: US and UN Standards, Human Rights Quarterly, Vol. 28, pp. 809-841 (2006) [hereinafter What Practices Constitute Torture]; see generally


17 For significant pre-9/11 works setting forth Yoo’s bold views on the war powers, see John C. Yoo, Clio at War: The Misuse of History in the War Powers Debate, 70 U. Colo. L. Rev. 1169 (1999); John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Cal. L. Rev. 167 (1996).

18 Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 22-23 (2007) [hereinafter The Terror Presidency]. This "War Council" included Alberto Gonzales, then White House Counsel, David Addington (Vice President Cheney’s Counsel), William J. Haynes (Gonzales's first deputy and former head of OLC under George H. W. Bush), Tim Flanigan, and John Yoo.

19 Id.


24 See Hersch, Qadaffi Targeted, supra note 21; Falk, Revolutionaries & Functionaries, supra note 21, at 198, n1.

25 See Falk, Revolutionaries & Functionaries, supra note 21, at 198.

26 See Schacht, Self-Judging, supra note 22, at 121, 122-23.


28 See, e.g., U.S. v. Alvarez-Machain, 504 U.S. 655 (1992) (official abduction of accused, for purposes of prosecution in the United States, although admittedly illegal under international law, was held not to provide the remedy of release, despite formal protest by the
Mexican government); *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (U.S. Marshalls convinced Mexican police officials to abduct defendant and transport him to the United States where he then was arrested).

29 This makes John Yoo's flimsy excuse for his opinions and actions, that such abuse takes place daily in United States jails and prisons, simultaneously frightening and pathetic.

30 *See* former StGB, § 53 (1986).

31 *See* former Ugolovnyj Kodeks, R.S.F.S.R. § 13.


33 *Ordre public* is also part of a nation's *Volksgeist*. See generally C. Engel and K.H. Keller, Global Networks and Local Values. A Comparative Look at Germany and the United States 46 (2002). International ordre *public* is often good. For example, Christopher Scott Maravilla, *Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law*, 17 Tul. J. Int'l & Comp. L. 113, 116 n.21 (2008). In article 19(3) of the International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171, the right of free speech is tempered with the following: “[It] carries with it special duties and responsibilities” and may be subject to restrictions “[f]or respect of the rights or reputations of others” and “[f]or the protection of national security or of public order (ordre public), or of
public health or morals." *See also, e.g.*, Katrina McClatchey, *The European Patent Office and the European Patent: An Open Avenue for Biotechnologists and “Living Inventions,”* 2 Okla. J.L. & Tech. 25, 8 (2004) (describing "ordre public" in relation to patent law: "[i]nventions, the exploitation of which is not in conformity with the conventionally accepted standards of conduct pertaining to the culture inherent in European society and civilization are to be excluded from patentability as being contrary to morality" (citation omitted)). *Referenced in* Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, *The Common Frame of Reference for European Private Law-Policy Choices and Codification Problems*, 28 Oxford J. Legal Stud. 659, 669 n.49 (2008). Domestically, ordre public when it abuts against international standards is related to the state's view that the international rule violates "enforcement state's public policy with respect to international relations." *See* Julian D.M. Lew et al., *Comparative International Commercial Arbitration* para. 16-1 (2003).


35 Fletcher, *Proportionality, supra* note 32, at 140.


37 *See generally* Falk, *Revolutionaries & Functionaries, supra* note 21, at 140.

38 *Torture Memo*, in *The Torture Papers*, *supra* note 16, at 172, 207. *The Torture Memo* occasionally is called the "Golden Shield" for CIA agents. Jan Crawford Greenburg,
Howard L. Rosenberg, & Arian de Vogue, *Sources: Top Bush Advisors Approved "Enhanced Interrogation,"
* in http://abcnews.go.com/print?id=458256. Although it was addressed to White House Counsel, Alberto Gonzales, from the head of the Office of Legal Counsel, Jay Bybee, according to press reports and John Yoo's public comments, Yoo drafted the Torture Memo and many others himself.

39 Torture Memo, *supra* note 16.


41 *Id.* at 205 (emphasis added). The statement in text is misleading in at least a couple of ways. The Chief Executive's war power, in Yoo's scheme of things, is in no sense limited to ensuring United States' security "in situations of grave and unforeseen emergencies," inasmuch as Yoo's scholarship recognizes an unlimited discretion to engage in executive wars. See, e.g., Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 Colum. L. Rev. 1450, 1453 (2006) [hereinafter *Toward a Rule of Law*] (reviewing John Yoo's *The Powers of War and Peace, supra* note 16) (observing that, for Yoo, the "presidential prerogative includes power to use the U.S. military as needed to address developing threats as well as actual attacks, and thus allows the President to decide when and how to begin armed conflict"). As developed in the text, it is also quite clear that Presidents have not been given an "express" authority to deploy military force.


43 Adler, *George Bush and the Abuse of History, supra* note 7, at 102. Yoo's reading of Hamilton's "Vesting Clause Thesis" is an especially aggressive one, as he insists that "Article II's Vesting Clause, by contrast [to Article I], grants to the president an unenumerated executive authority." Yoo, *The Powers of War and Peace, supra* note 16, at 18. For Yoo, it becomes clear that "Article II effectively grants to the President any unenumerated foreign affairs powers not given elsewhere to the other branches." *Id.* The bit of "enumeration" of
executive power contained in Article II, such as the treaty power, reflects efforts “to dilute the unitary nature of the executive branch, rather than to transform these functions into legislative powers.” *Id.* at 19.


45 One of our most distinguished constitutional historians has suggested an extremely plausible explanation of the different language in Articles I and II. The difference in wording, says Professor Currie, “may well have been accidental.” David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 177 (1997).

46 Professor Sofaer, former Legal Adviser to the U.S. Department of State in the Reagan Administration, observed that, even if the Vesting Clause Thesis were quite valid, it “arguably yields only limited powers, in light of the numerous grants of foreign-affairs and military authority to Congress.” Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 3 (1976) [hereinafter The Origins]. He observes, further, that the commander-in-chief clause . . . reads most readily as a grant to manage military engagements and other objectives authorized by Congress.” *Id.*

Professor Farber observes that the granting (or “vesting”) of "the executive power" may sound “weighty,” but “one might question whether the president was such a momentous figure after all, since the drafters thought it necessary to include express sanction even for the president to get written opinions from the cabinet or to recommend legislation to Congress.” Daniel A. Farber, Playing Without a Referee: Congress, the President, and Foreign Affairs, 19 Const. Comm. 693, 697 (2002) (reviewing H. Jefferson Powell's The President's Authority Over Foreign Affairs, infra note 138). As to the Vesting Clause Thesis, then, Farber concludes that “if we ask what an actual intelligent Eighteenth Century reader, who made a reasonable effort to understand the text, would have understood about Article II the answer can only be that such a reader would have been unsure about the exact parameters of executive authority. To bind such a ratifier to esoteric deductions made long after the fact would make the Constitution an exercise in bait-and-switch, not in the consent of the governed.” Id. at 701.

The Torture Papers, supra note 16, at 205. No delegate to the Constitutional Convention, Professor Adler reminds us, advanced a theory of inherent power. Madison justly remarked: “The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of laws to be
executed." Manifestly, the concept of an inherent executive power, a Lockean Prerogative to improvise law, to act in the absence of legislation or in violation of it, does not presuppose the existence of the laws to be executed.


49 Perhaps the most recent and thorough critique of the Vesting Clause Thesis has been supplied by an important 2004 law review article. Bradley & Flaherty, Executive Power Essentialism, supra note 44. Bradley and Flaherty conclude that “[t]he historical sources that are most relevant to the Founding, such as the records of the Federal Convention, the Federalist Papers, and the state ratification debates, contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it.” Id. at 551. For the defense of a somewhat more constrained reading of the Vesting Clause Thesis than the one set forth by Professor Yoo, see What Lurks Beneath, supra note 47, at 382-393.

50 Professor Adler has observed that it was Hamilton himself, in Federalist No. 75, who “explained that fears of unilateral presidential power precluded executive control of foreign affairs,” a fact which makes anomalous Hamilton's subsequent “assertion that the Constitution asserted a broad comprehensive grant of executive power to the president.” Adler, George Bush and the Abuse of History, supra note 7, at 104. See Alexander Hamilton, The Federalist No. 75, at 506 (Jacob E. Cooke ed. 1961) [hereinafter The Federalist] (contending that “[t]hough it would be imprudent to confide in him [the Chief Executive] solely so important a trust” as “the management of [the nation's] external concerns,” it is also true “that his participation in it would materially add to the safety of the society”). By contrast, Yoo underscores only Hamilton's assertion that “[e]nergy in the executive is a leading character in the definition of good government” and “is essential to the protection of the community against foreign attacks.” Yoo, The Powers of War and Peace, supra note 16, at 21 (quoting The Federalist, No. 70, supra, at 471).

51 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring). Alan Westin observed that the Truman administration initially tried to rely on the Vesting Clause

See also Adler, George Bush and the Abuse of History, supra note 7, at 109-10 (observing that "Justice Jackson's denunciation of the inherent powers thesis included a rejection of the argument that the Vesting Clause is a grant in bulk of all conceivable executive power," as well as an affirming of the view that the President's power was limited to "an allocation to the presidential office of the generic powers thereafter stated, a view that reflects the Framers’ aim to limit executive power"); Bradley & Flaherty, Executive Power Essentialism, supra note 44, at 546-47 (observing the Justice Jackson's well-known concurring opinion clearly "repudiated" the Vesting Clause Thesis).

53 Bradley & Flaherty, Executive Power Essentialism, supra note 44, at 548 (citing the Washington Post).

54 Id. at 558-59. The Vesting Clause Thesis appears to rest on the assumption executive authority is derived as much from America's sovereignty as from the powers granted by the Constitution. Compare United States v. Curtiss-Wright Export Co., 299 U.S. 495 (1936). In that case, Justice Sutherland "carves a broad exception to the historic conception, often reiterated, never questioned, and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only." Louis Henkin, Foreign Affairs and the United States Constitution 19 (1996) [hereinafter Foreign Affairs]. This sort of inherent executive powers theory, moreover, "requires that a panoply of important powers be deduced from unwritten, uncertain, changing concepts of international law and practice, developed and growing outside our constitutional tradition and our particular heritage." Id. at 20. Even more recently, Professor Ramsey observed "that there is not much direct evidence refuting Sutherland's claim. But there is substantial indirect evidence. When a leading commentary such as The Federalist discussed foreign affairs, it did so in terms of delegated powers, not inherent powers." Ramsey, The Constitution's Text in Foreign Affairs, supra note 44, at 24. Accord, id. at 17 (
“The Constitution's drafters claimed that the Constitution itself established that principle; as drafter James Wilson argued, 'everything which is not given, is reserved.'”), quoting, 2 Documentary History of the Ratification of the Constitution 167-68 (Merrill Jensen ed. 1976) (Speech in the State House Yard, Oct. 6, 1787) [hereinafter Documentary History].

55 Executive Power Essentialism, supra note 44, at 559. quoting, James Madison, The Federalist No. 45, supra note 50, at 313. Madison pointedly contrasted the national government's “few and defined” powers with the States' “numerous and indefinite” powers. Id. Professor Yoo previously has demonstrated a fundamental lack of understanding as to how central the idea of enumerated powers was to the conception of constitutionalism that the Constitution's founders embraced. Compare John Choon Yoo, Our Declaratory Ninth Amendment, 41 Emory L.J. 967 (1993), with Thomas B. McAffee, Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights, 36 Wake Forest L. Rev. 747, 781 n. 133 (2001).

56 See Michael J. Glennon, Constitutional Diplomacy 72 (1971) [hereinafter Constitutional Diplomacy] (“[t]he principal textual fount of the President's war-making power, whatever its scope, is the commander-in-chief clause: ‘The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . .’”). If students of Yoo's work find this claim startling, they might notice that it was Supreme Court Justice Sutherland, who held in favor of inherent executive authority (see note 54 supra), who also contended (in an earlier work of scholarship) that “[t]he Constitution confers no war power upon the President as such.” George Sutherland, The Constitution and World Affairs 73 (1919), quoted in Wormuth & Firmage, To Chain the Dog of War. supra note 5, at 113. For more on the commander-in-chief authority, see infra notes 139-47.

57 Ramsey, Toward a Rule of Law, supra note 41, at 1455.

58 Id.

of the declare war clause as confirming a mere “ceremonial duty” to ratify “an obvious condition of war and thus to give a certain official imprimatur of its own to events of a de facto belligerancy that have already taken place,” see William Van Alstyne, **Congress, the President, and the Power to Declare War: A Requiem for Vietnam**, 121 U. Pa. L. Rev. 1, 5 (1972) [hereinafter *A Requiem for Vietnam*].


61 *Id.* at 86.

62 No one doubts that legislative control over funding had been, and remained, an important check on executive war-making—as was the general absence, reinforced by some state constitutional provisions prohibiting (or limiting the use of) standing armies. Yoo manages to omit reference to the other central limiting device—that the states implicitly were prohibited from waging war by the Articles of Confederation's grant of “the sole and exclusive right and power of determining on peace and war” to the Continental Congress. See *infra* note 64. This vertical division of authority played as important a role as horizontal separation of powers might have played.

63 John Yoo, The Powers of War and Peace, *supra* note 16, at 30. It is striking, however, that all of the most relevant foreign affairs powers—to decide for war and to enter into treaties with other nations—belonged exclusively to the national government, while the governors, as commanders-in-chief, possessed merely the authority to act militarily to defend the state. See Adler, *Presidential Warmaking, supra* note 6, at 183, 190-91.

64 Adler, *Presidential Warmaking, supra* note 6, at 190-91. Undoubtedly another reason Yoo is attracted to the Vesting Clause Thesis is that the evidence is so clear that the Framers perceived the commander-in-chief as possessing nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all of which by the Constitution under consideration would appertain to the Legislature.
Alexander Hamilton, The Federalist, No. 69, supra note 50, at 465. For other helpful discussions, see Bradley & Flaherty, Executive Power Essentialism, supra note 44, at 601 (comparing Hamilton's convention proposal with the New Jersey Plan's reference to "a presidential power to 'direct all military operations' and the Federalist Papers' reference to the President's "supreme command and direction of the military and naval forces"); Henkin, Foreign Affairs, supra note 54, at 46 (among other things, observing that "generals and admirals, even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others"); Wormuth, The Nixon Theory, supra note 4, at 634 (observing that "[n]either friends nor foes of the Constitution considered that the office of Commander in Chief carried with it a legal power to make political decisions," for "the political powers remained with Congress, as under the Articles of Confederation").

65 John Yoo, The Powers of War and Peace, supra note 16, at 65. To illustrate the growing commitment to executive power, Yoo places great weight on the publication of objections to the proposed, but rejected, constitution for the state of Massachusetts. In the document entitled The Essex Result, Theophilus Parsons, for the objecting county, criticized the proposed constitution for "undermining the governor's powers as 'Captain- General' of the army and navy." Id. at 70. The Result contended that the Governor should "alone marshal the militia, and regulate the same, together with the navy," and argued for empowering the "privy council" (the executive council) to approve of "marching the army outside the state." Id. Yoo insists that "following the ideals set forth in the Essex Result, the influential Massachusetts constitution envisioned a system in which the executive first took action in war, and then sought approval after the fact from the legislature and the people. Of course, the legislature also would retain the ability to participate before the fact by using its appropriations power to refuse to fund the military." Id. at 71.

Professor Streichler, however, makes these observations:

Massachusetts, according to the Essex Result, had nothing to do with "external executive" powers concerning "war, peace." That was for the Confederation Congress. The state's executive
power was limited to the “internal executive power” to “marshal and command” troops “in the defense of the state.”


66 Ramsey reminds us that “there was near unanimity in America to build a republic – that is, a government founded upon the people, as England was not.” Ramsey, Toward a Rule of Law, supra note 41, at 1458. Given the necessity of building a “federal republic—that is, a government founded upon the constituent states,” the Constitution’s Framers looked “to the experiences of classical Greece and Rome, whose histories they knew well, and to their own experiences under the Articles of Confederation and the early state constitutions.” Id. What they adopted was “an amalgamation of English, Classical and contemporary ideas.” Id.

67 The Articles of Confederation, Act of Confederation of the United States of America, 15 Nov. 1777, reprinted in, 1 Documentary History, supra note 54, at 89.

68 Article IX of the Articles of Confederation reads: “The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war.” Act of Confederation of the United States of America, 15 Nov. 1777, reprinted in, 1 Documentary History, supra note 54, at 89. See the discussion in Wormuth and Firmage, To Chain the Dog of War, supra note 5, at 17.

69 See supra note 64 and accompanying text. We sometimes do not stop to realize that under the Articles of Confederation, “Congress exercised both legislative and executive powers.” Charles A. Lofgren, “Government From Reflection and Choice”: Constitutional Essays on War, Foreign Relations, and Federalism 6 (1986) [hereinafter War, Foreign Relations, and Federalism].

70 Professor Ramsey concludes that “the exercise of foreign affairs powers under the Articles closely
followed its textual allocations," where “Congress exercised the foreign affairs powers granted to it in the document – principally war, diplomacy, and treatymaking." Ramsey, The Constitution's Text in Foreign Affairs, supra note 44, at 35. Moreover, “where the Articles neither granted foreign affairs power to the Congress nor denied them to the states, the powers in question were exercised by the states and not the Congress. . . . [E]ssentially all foreign- affairs related legislation and enforcement occurred at the state level.” Id.

71 See Article IX of the Articles of Confederation. Act of Confederation of the United States of America, 15 Nov. 1777, reprinted in, 1 Documentary History, supra note 54, at 89 (emphasis added).

72 1988 Senate War Powers Legislation: Hearings Before the Special Subcomm. on War Powers, Comm. on Foreign Relations, U.S. Senate 100th Cong. 2d Sess. 1230-31 (1989), quoted in, Glennon, Constitutional Diplomacy, supra note 56, at 81 n. 60. Contrast Schlesinger's historical testimony with the Truman administration's view that “the Commander in Chief Clause encompassed the authority not simply to manage wars approved by Congress but the right to start them unilaterally as well: ‘The President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof.'” Ely, War and Responsibility, supra note 8, at 11, quoting 23 State Dep't Bull. No. 578, at 173 (July 31, 1950).) For support of the Schlesinger view of the commander-in-chief power, see supra note 64.

73 This is why one of the most strenuous objections to the proposed Constitution during the debate over its ratification was its grant of power to the Congress to create a standing army. See, e.g., Thomas Jefferson to Alexander Donald, 7 Feb. 1788, in 9 Documentary History, supra note 54, at 354 (contending that a Bill of Rights provision prohibiting standing armies was a right to which the people were entitled); George Mason’s Objections to the Constitution of Government formed by the Convention, in 9 Documentary History, supra note 54, at 45 (objecting that “[t]here is no Declaration . . . against the Danger of standing Armies in time of peace”); Richard Henry Lee, Proposed Amendments, in 9 Documentary History, supra note 54, at 64 (Constitution should have a Bill of Rights stating that “standing armies in times of peace are dangerous to liberty, and ought not to be permitted”).
Even the state constitution that included a “popularly elected Governor," who was the constitutional commander of the state's armed forces, only granted “broad powers to direct the military ‘for the special defence and safety of the Commonwealth.’ Mass. Const. (1780), ch. II, § 1, art. VII.” Sofaer, The Origins, supra note 46, at 386 n. 55. Typical of the early state constitutions was Virginia's, which “provided that its governor ‘shall, with the advice of a Council of State exercise the executive powers of government,’ but only ' according to the laws of this Commonwealth,’” and affirmed that he was “not, under any pretense, to exercise any power or prerogative, by virtue of any law, statute or custom of England.’ Va. Const. (1776), art. 7.” Id. Cf. U.S. Const., art. I, Section 10, cl. 3 (“No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

1 The Records of the Federal Convention 21 (M. Farrand ed. 1911) [hereinafter 1 Farrand], cited in, Wormuth and Firmage, To Chain the Dog of War, supra note 5, at 17.

It might be underscored, however, that the Virginia Plan “contained no specific reference . . . to the power of either the executive or the legislative branch to commit the nation to war.” Lofgren, War, Foreign Relations, and Federalism, supra note 69, at 11.


Id. (citing 1 Farrand, supra note 75, at 64-65). For useful discussion of Pinckney's concerns, see Louis Fisher, Lost Constitutional Moorings: Recovering the War Power, 81 Ind. L.J. 1199, 1202 (2006) [hereinafter Lost Constitutional Moorings] (concluding that “[a]t the Philadelphia Convention in 1787, where the delegates assembled to draft the Constitution, the monarchical model was rejected whenever it was raised”).

Donald Robinson observes that the decision to give “the war-making to Congress was dictated” by the historical experience that “[k]ings had always been involving and impoverishing their people in wars, pretending generally if not always, that the good of the people was the object.” Donald L. Robinson, “To the Best of My Ability”: The Presidency and the Constitution 222 (1987) (hereinafter To the Best of My Ability). But such wars were “the most oppressive of all kingly oppressions,” which prompted those in Philadelphia “to so frame the Constitution that no one man should hold power of bringing this oppression upon us.” Id. See
infra notes 90-91 and accompanying texts.

There was much the framers disagreed about, but the desire to avoid a monarchy was not one of them. Some went so far as to think that “a single executive was, in Virginia governor Edmund Randolph's phrase, 'the foetus of monarchy.'” Rudalevige, supra note 9, at 19. Cf. Fisher, Lost Constitutional Moorings, supra note 78, at 1202 (observing that Edmund Randolph, who called a single executive “the foetus of monarchy,” also stated that the Convention had “no motive to be governed by the British Governm[ent] as our prototype”). See also Max Farrand, The Framing of the Constitution of the United States 77 (1913) (several delegates, including Randolph, “distrusted a single executive as savoring of monarchy”).

Concentrating power in one individual, as the pseudonymous “Cato” later wrote in opposition to the Constitution, “would lead to oppression and ruin. . . . The world is too full of examples, which prove that to live by one man's will became the cause of all men's misery.” The power to make war, to conduct diplomacy, to appoint administrators and judges, to pardon crimes, to convene and dismiss the legislature—all these needed to be checked and controlled.

Id.

80 Yoo, The Powers of War and Peace, supra note 16, at 91 (citing 1 Farrand, supra note 75, at 65).

81 Id. at 91-92 (citing 1 Farrand, supra note 75, at 65-66.)

82 Louis Fisher observed, for example, that in Wilson's mind “the British model 'was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.'” Fisher, Lost Constitutional Moorings, supra note 78, at 1202, quoting, 1 Farrand, supra note 75, at 66. In the end, Wilson was satisfied that the American Constitution, as proposed in 1787, supplied a system that “will not hurry us into war,” and the required concurrence of the House of Representatives in the decision to fight a war would mean that “nothing but our national interest can draw us into war.” James Wilson, 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 528 (1941) [hereinafter Elliot's Debates]. Wilson's views are helpfully
discussed at David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *The Conduct of American Foreign Policy*, *supra* note 8, at 19, 22.

83 Perhaps worse than failing to note the apparent consensus, Yoo even asserts that “[a]t this point in the debate, the Framers seemed to agree that vesting the president with all the ‘executive powers’ of the Articles of Confederation would include the power over war and peace.” Yoo, *The Powers of War and Peace*, *supra* note 16, at 92. But the summary of comments reviewed in text confirms that Pinckney, Rutledge, and Wilson all agreed that the Constitution should *not* be written to grant to the executive the decision whether or not to fight a war. And as we shall see, it was *not*.

84 Wormuth & Firmage, *To Chain the Dog of War*, *supra* note 5, at 18. The phrase “determining on war” comes from Article IX of the Articles of Confederation. See *supra* note 70 and accompanying text. For useful, related discussion, see Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* 20 (2005) (hereinafter Hijacked) (summarizing statements of Pinckney, Rutledge, and Wilson, and concluding that they reflect wide agreement that executive powers “should be confined and defined” to avoid “the evils of elected Monarchies”); Adler, *Presidential Warmaking*, *supra* note 6, at 183, 184-85 (concluding that “the discussion appears to reflect an understanding that the power of ‘war and peace’–the power to initiate war–did not belong to the executive but to the legislature”).

85 See 2 The Records of the Federal Convention 318 (M. Farrand ed. 1911) [hereinafter 2 Farrand]. Professor Lofgren observes that, “[d]espite the paucity of prior debate and the ambiguity of the resolutions sent to it, the Committee on Detail had little trouble in allocating the war-making power. Randolph and Wilson each prepared draft constitutions which assigned the power ‘to make war’ to the legislature. The draft reported by the committee to the Convention on August 6 followed the same scheme.” Lofgren, *War, Foreign Relations, and Federalism*, *supra* note 69, at 11-12. Despite the lack of anything in writing they were drawing from, “the committee sensed the will of the Convention on these points–points which, it must be remembered, had scarcely been debated–war-making fell almost automatically to Congress.” *Id.* at 12. Contrast Lofgren’s assessment of the developments at the convention with Yoo’s assertion that James Wilson was the single Federalist who viewed the Declare War Clause as a limit on executive war power. Yoo, *The Powers of War and Peace*, *supra* note 16, at 121.
86 2 Farrand, *supra* note 85, at 318.

87 *Id.* Notice that the famous Gerry statement that he “never expected to hear in a republic a motion to empower the Executive alone to declare war” referred to the argument by Pierce Butler for vesting the war power in the President. Both Butler and Gerry are clearly assuming that the power to “declare” war is the functional equivalent of the power to decide to “make” war. Louis Fisher, *Unchecked Presidential Wars*, 148 U. Pa. L. Rev. 1637, 1648 (2000).

88 Adler, *Presidential Warmaking*, *supra* note 6, at 183, 185. Fisher, *Lost Constitutional Moorings*, *supra* note 78, at 1203 (confirming that “Butler spoke out in favor of presidential war-making power,” but noting that “[n]ot a single delegate supported Butler”). *But cf.* Yoo, *The Powers of War and Peace*, *supra* note 16, at 97 (“*Others* went further than Pinckney in their skepticisim of Congress. But instead of seeking to move all war power to the Senate, the seat of sectional interests, they proposed an expansion of the executive role in warmaking through the presidency) (emphasis added).

89 *See also* Ely, *War and Responsibility*, *supra* note 8, at 3 (1993). By contrast to Butler's sentiments, Ramsey points out that “[a]t least eight leading members of the Philadelphia Convention said specifically during the drafting process that the President should not have have the power to initiate war.” Ramsey, *Toward a Rule of Law*, *supra* note 41, at 1460.


91 *Id.*

92 2 Farrand, *supra* note 85, at 318. Though some purport to find uncertainty of meaning in Madison's notes about this amendment, Professor Henkin persuasively suggests that “[t]he language was changed, it appears, so as not to deny the President power to make war when necessary to repel invasion.” Henkin, *Foreign Affairs*, *supra* note 54, at 369 n. 64. Compare Madison's description of the purpose for the amendment, to clarify a recognition of an executive authority “to repel sudden attacks,” with the Constitution's express
prohibition on any of the states to “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” U.S. Const. art. I, § 10, cl. 3. The constitutional provision limiting the states also supports the “pro-Congress reading of the Declare War Clause, for in requiring the states to obtain the consent of Congress rather than the President, it suggests that Congress was thought to be the appropriate branch to have the final say on whether war will be waged.” Andrew Campanelli, Kai Draper, & Jack Stucker, The Original Understanding of the Declare War Clause, 24 J. L. & Politics 49, 60 n. 36 (2008).


94 Id. at 97-98.

95 As Professor Ramsey points out, for example, even if it “is right that Madison’s floor amendment substituting ‘declare’ for ‘make’ created ambiguities,” it is still wrong “to ignore the fact that the delegates seriously considered giving all war powers to Congress.” Ramsey, Toward a Rule of Law, supra note 41, at 1460.

96 Stephen Holmes, John Yoo’s Tortured Logic, The Nation (May 1, 2006), at 4.

97 Id. A recent article asserted that there are many historical references “to Congress's being given ‘the power of war,’ ‘the war powers,’ ‘the power to make war,’ the ‘power to determine that question of war or peace,’ ‘the power to put the nation from a state of peace to a state of hostilities,’ ‘the power to put the nation in a condition of war,’ etc.” Campanelli, Draper, & Stucker, The Original Understanding of the Declare War Clause, supra note 92, at 51.

For the last twenty years, I have included one treatment of the August 17 Convention discussion in a war powers handout for my constitutional law course, and the reader might find it helpful. See Van Alstyne, A Requiem for Vietnam, supra note 59, at 5-7. See also Adler, Presidential Warmaking, supra note 6, at 183, 185-86.

98 In the Convention debate, George Mason made clear that he “was for clogging rather than
facilitating war; but he was for facilitating peace. He preferred ‘declare' to 'make.’” Wormuth and Firmage, To Chain the Dog of War, supra note 5, at 18. See David Cole & Jules Lobel, Less Safe, Less Free: Why America is Losing the War on Terror 89-90 (2007), citing James Madison, Notes of Debates in the Federal Convention of 1787, at 476 (rev. ed. 1984) [hereinafter Less Safe, Less Free] (remarks of George Mason) (concluding that the framers “felt it would be far easier for one person to involve the nation in war than it would be to obtain the broad consensus necessary for legislative approval,” with the implication that “the Constitution was intended to ‘clog’ rather than to ‘facilitate’ war.”). Based on his careful review of the history, John Ely concluded that “[t]he founders assumed that peace would (and should) be the customary state of the new republic,” and that Madison “sought to arrange the Constitution so as to assure that expectation.” Ely, War and Responsibility, supra note 8, at 3. Putting Congress in charge of war-making decisions embodied not the view that Congress held a unique expertise, but rather “that requiring its assent would reduce the number of occasions on which we would become thus involved.” Id. Little wonder that, as Professor Lofgren observed, the high-spirited ratification debates generated a single amendment that “had anything to do with Congress’s war power,” and that was New York’s proposal to require “a two-thirds vote in each house of Congress for a declaration of war.” Lofgren,War, Foreign Relations, and Federalism, supra note 69, at 16. See supra notes 70-71 and accompanying texts.