

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

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

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

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

I.

YOO’S “ORIGINAL UNDERSTANDING”

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

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

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

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

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

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

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

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

51. *Id.* at 175.

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

53. *Id.* (emphasis added).

54. *Id.* (emphasis added).

55. *Id.* (emphasis added).

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

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

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

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

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

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

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

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

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

62. *Id.* at 197.

63. *Id.*

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

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

66. *See id.* at 195–217.

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

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

II.

YOO’S WAR POWERS

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

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

A. *The Declare War Clause*

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

1. *Argument from the Text*

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

68. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

69. Yoo, *War Powers*, *supra* note 1, at 295.

70. *Id.* at 252.

71. *Id.* at 295.

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

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

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

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

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

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

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

75. *Id.* at 1546.

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

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

78. *Id.* at 242.

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

2. *Argument from the Convention Debates*

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

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

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

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

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

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

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

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

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

B. Congress's Other Article I Powers

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

Notably, the argument that Congress's war powers are limited to appropriations and impeachment almost completely ignores other express congressional war powers. Yoo discounts the power to issue letters of marque and reprisal (which authorize private capture of foreign ships or property and retaliation for attacks) by classifying it also as a mere judicial function.¹¹⁰ And his argument simply ignores¹¹¹ Congress's other war powers: to raise and support armies; provide and maintain a navy; make rules for the government and regulation of the land and naval forces; provide for calling out the militia to suppress insurrections and repel invasions; provide for organizing, arming, disciplining and governing the militia; make rules concerning captures on land and water; and define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.¹¹² All of these powers represent departures from British law and indicate that Congress was to have a central, indeed a primary, role in matters of war.

C. The Vesting and Commander-in-Chief Clauses

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

108. Yoo, *War Powers*, *supra* note 1, at 295.

109. *Id.* at 174, 241.

110. *Id.* at 250–51.

111. *See id.*

112. U.S. CONST. art. I, § 8. One might also add the power to regulate foreign commerce and Congress's role in making treaties.

113. *See* Yoo Memo, *supra* note 19, at 4 (“The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause.”).

114. Yoo, *War Powers*, *supra* note 1, at 176.

115. U.S. CONST. art II, § 1, cl. 1.

116. Yoo, *War Powers*, *supra* note 1, at 242.

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

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

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

It has long been the view of [OLC] that the Commander in Chief Clause is a substantive grant of authority to the President [citing only to a memo from William J. Rehnquist, then head of the OLC, on the Vietnam War and Yoo’s own September 25, 2001 memo¹²²]. This authority includes all those powers not expressly delegated by the Constitution to Congress that have traditionally been exercised by commanders in chief of armed forces.¹²³

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

118. U.S. CONST. art. II, § 2, cl. 1.

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

120. *Id.*

121. U.S. CONST. art. I, § 8.

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

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

D. The British Model

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

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

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

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

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

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

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

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

129. *Id.* at 276.

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

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

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

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

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

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

132. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

141. *Id.*

142. *Id.* at 278.

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

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

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

III.

LAW REVIEWS AND LEGAL SCHOLARSHIP

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

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

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

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

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

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

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

of professional misconduct and proposed referral to state bar disciplinary authorities were reduced to a finding of “poor judgment.”¹⁹³

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

CONCLUSION

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

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

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

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

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

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

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