

BOOK REVIEW

AN INSIDER'S LOOK AT THE WAR ON TERRORISM

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WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR.
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INTRODUCTION

Professor John Yoo is a highly intelligent yet controversial legal scholar. As a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel between 2001 and 2003, he played an important role as a champion of presidential power during the early days of the war on terrorism. The *Washington Post* wrote that Professor Yoo is “[w]idely considered the intellectual architect of the most dramatic assertion of White House power since the Nixon era,”¹ and protesters at University of California Berkeley School of Law, Boalt Hall (where Professor Yoo now teaches), demanded that he either renounce his earlier views on the treatment of prisoners in the war on terror or resign his professorship.² He did neither.

My interest in the constitutional power of the executive over national security began more than four decades ago—before John Yoo was born—when I attended a lecture by Professor Quincy Wright. Later, as national security adviser to a member of the Senate Foreign Relations Committee during the Nixon Administration, I strongly defended executive power over the conduct of war, foreign affairs, and intelligence. I have also written a 1700-page doctoral dissertation on “National Security and the Constitution.” So these are hardly new issues to me.

Because I believe the Founding Fathers vested in the President considerable and often unchecked discretion in the area of national

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¹ Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping*, WASH. POST, Dec. 26, 2005, at A3.

² Jacob Schneider, *Protest Targets Law Professor's Prisoner Memo*, DAILY CALIFORNIAN, June 28, 2004, at 1, available at <http://www.dailycal.org/sharticle.php?id=15545>.

security—authority that Congress has often usurped during the past four decades—Professor Yoo’s efforts to reclaim executive power in this area have in many respects pleased me. However, Professor Yoo and the Bush Administration have in my view gone too far in some areas. More importantly, the Administration has all too frequently accompanied broad claims of executive power with either no public explanation or an inadequate explanation. Thus, Professor Yoo’s efforts have often left me frustrated and may well result in further discrediting some truly legitimate claims of executive power.

To Professor Yoo’s credit, his book, *War by Other Means*, repeatedly acknowledges that he and others in the Administration “did not explain [them]selves as clearly as [they] could have” on several critical issues.³ Before turning to my commentary on this very important book, a brief review of the original understanding of constitutional power in the area of national security may be useful.

THE IMPORTANCE OF TRYING TO ASCERTAIN THE “ORIGINAL UNDERSTANDING” OF THE CONSTITUTION

Words are imperfect instruments used to convey ideas. Particularly when dealing with the wording of the Constitution, it is important to understand the original meaning and intent of its words. Although it is challenging to ascertain the subjective “original intent” of people who lived and died more than a century ago, the Framers of our Constitution left a treasure trove of writings that makes the search for their understanding of the constitutional text productive, even on issues where their opinions clearly diverged.

For example, some terms that had a clear meaning in 1787 have largely lost that meaning over the centuries. I once read a commentary on the new Constitution by one of its strongest supporters who described it as being “awful.” Most Americans today associate the word “awful” with something truly terrible or horrible; yet, even today, some dictionaries record the historic meaning of “awful” as “inspiring awe” or “filled with awe.”⁴ Without an understanding of that historic meaning, trying to understand a reference to our “awful Constitution” is unlikely to be successful.

Similarly, phrases like “declare War”⁵ and “executive Power”⁶ had widely understood meanings in 1787 that have largely been lost in the

³ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 177 (2006); *see id.* at viii (“The other responsible party has been the Bush Administration. [It] has often failed to explain clearly to the public the difficult decisions al Qaeda has forced upon us.”).

⁴ *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 86 (11th ed. 2004).

⁵ U.S. CONST. art. I, § 8, cl. 11.

⁶ *Id.* art. II, § 1, cl. 1.

modern world. Without an appreciation of these terms as understood when the Constitution was written, we are less likely to understand its intended meaning.

THE ORIGINAL UNDERSTANDING OF "EXECUTIVE POWER"⁷

The distinguished Professor Quincy Wright explained in his 1922 classic, *The Control of American Foreign Relations*, that "when the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto."⁸ Consider, for example, the following excerpt from Senate Foreign Relations Committee Chairman J. William Fulbright's remarks at Cornell Law School in 1959:

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.⁹

Chairman Fulbright refers not merely to the President's role in carrying out foreign policy—as if the President might be simply the agent of Congress for the limited business of communicating with foreign leaders—but rather recognizes the President's responsibility for the "formulation" of policy as well. Obviously, the Senate also has an important role to play in foreign policy.¹⁰ Indeed, the United States cannot ratify a treaty without the consent of two-thirds of the Senate.¹¹ However, beyond the powers that the Constitution expressly granted to the Senate or Congress—including the power to "declare War"¹² and the prohibition against spending treasury funds without an appropriation made by law¹³—throughout most of our history there has been a strong consensus that the President has primary responsibility for the safety of the nation in its foreign relations.

⁷ *Id.*

⁸ QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 147 (1922).

⁹ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 *CORNELL L.Q.* 1, 3 (1961).

¹⁰ See, e.g., U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

¹¹ See *id.*

¹² *Id.* art. I, § 8, cl. 11.

¹³ *Id.* § 9, cl. 7.

As Professor Yoo understands, there is a wealth of documentary evidence establishing that the original understanding of “executive Power” included the general management of foreign affairs, diplomacy, intelligence, and the conduct of war once authorized by Congress or initiated by a foreign state. Professor Yoo observes:

Article II of the Constitution also vests the president with “the executive power,” which, in Justice Scalia’s words, “does not mean *some* of the executive power, but *all of* the executive power.” Political theorists at the time of the framing considered foreign affairs and national security as quintessentially executive in nature, and our Constitution creates an executive branch that can act with unity, speed, and secrecy to carry out those functions effectively. Congress has important powers, such as the power to issue rules to regulate and govern the military, which gives it the sole authority to set the rules of military discipline and order. But the Constitution nowhere vests in Congress any explicit authority to dominate national security policy, nor gives it an outright veto over executive decisions in the area.¹⁴

While Professor Yoo is correct that the drafters of the Constitution did not intend Congress to “dominate national security policy,” the drafters did vest certain executive powers in the Senate, including its negative over treaties and diplomatic nominations.¹⁵ Additionally, the drafters granted other executive powers to the Congress as a check against executive abuse, including the power to “declare War.”¹⁶ Thus, a more correct statement than Justice Scalia’s¹⁷ would be James Madison’s description of the separation of powers: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department”¹⁸

In a reference to the famous 1793 *Pacificus-Helvidius* debate between Alexander Hamilton and James Madison over President George Washington’s decision to declare neutrality in the war between France and Great Britain, Professor Yoo notes that Thomas Jefferson urged

¹⁴ YOO, *supra* note 3, at 103 (citations omitted).

¹⁵ U.S. CONST. art. II, § 2, cl. 2.

¹⁶ *Id.* Thus, in a September 1789 letter to Madison, Thomas Jefferson confirmed the prevailing thinking when he wrote: “We have already given, in example, one effectual check to the [d]log of war, by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 392, 397 (Julian P. Boyd ed., 1958). Because the Articles of Confederation vested all war powers in the Continental Congress, THE ARTICLES OF CONFEDERATION, art. VI, Jefferson’s comment clearly referred to transferring this power from its natural home as part of the executive power to the Congress.

¹⁷ See *supra* note 14 and accompanying text.

¹⁸ Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 WRITINGS OF JAMES MADISON 405, 405–06 n.I (Gaillard Hunt ed., 1904).

Madison to take up that struggle.¹⁹ Consequently, Professor Yoo “decided to take Hamilton as [his] role model.”²⁰ This is perhaps not the time to argue my belief that Jefferson and Madison were essentially “forum shopping” when they tried to shift to Congress the decision over whether to support France in its war with Britain, but both before and after that debate they viewed the President as the senior partner in the nation’s foreign intercourse because he held the nation’s “executive power.” In *The Federalist No. 47*, Madison praised “the celebrated Montesquieu” as “the oracle who is always consulted” on separation-of-powers issues.²¹ Even as *Helvidius*, Madison acknowledged that writers like Montesquieu and Locke viewed foreign affairs as part of the executive power. Yet, Madison then tried to discredit them by alleging that they were “warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.”²²

Likewise, one cannot easily reconcile Jefferson’s 1793 opposition to Hamilton’s *Pacificus* theory with his own April 1790 memorandum to President Washington. In responding to a query about where the Constitution had placed decisions regarding foreign affairs and diplomacy that were not expressly addressed in the instrument, Jefferson reasoned:

[The Constitution] . . . has declared that the Executive powers shall be vested in the President, submitting special articles of it to a negative by the Senate

The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.²³

Three days later, Washington recorded this entry in his diary:

Tuesday, 27th. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. [Chief Justice John] Jay’s and Mr. Jefferson’s—to wit—that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the

¹⁹ See YOO, *supra* note 3, at xii.

²⁰ *Id.*

²¹ THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

²² James Madison, *Helvidius* Number I, reprinted in ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 55, 58 (Morton J. Frisch ed., 2007) (footnote omitted).

²³ Thomas Jefferson, Opinion on the Question Whether the Senate has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions (Apr. 24, 1790), in 3 THE WRITINGS OF THOMAS JEFFERSON 15, 16, 17 (Albert Bergh ed., 1903).

person nominated by the President, all the rest being Executive and vested in the President by the Constitution.²⁴

By this same logic, Hamilton also viewed the Executive as having broad constitutional powers over war and foreign affairs. As *Pacificus*, he wrote in 1793:

The general doctrine . . . of our [C]onstitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.

. . . .

It deserves to be remarked, that as the participation of the [S]enate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.

While therefore the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War—it belongs to the “Executive Power,” to do whatever else the laws of Nations . . . enjoin, in the intercourse of the U[nited] States with foreign Powers.²⁵

Thus, Jefferson and all three authors of *The Federalist Papers* shared the view that the grant of the nation’s executive power in Article II, Section 1 gave the President the general control of foreign affairs subject to narrowly construed exceptions expressly vested in the Senate or Congress. Professor Yoo includes several excerpts from *The Federalist* reaffirming the Executive’s special responsibilities in the realm of foreign affairs, quoting Hamilton’s observations that “[e]nergy in the executive . . . is essential to the protection of the community against foreign attacks,” and “[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”²⁶

Additionally, Chief Justice John Marshall—like Hamilton, one of Jefferson’s political enemies—also expressly embraced the case for largely unchecked executive powers over the nation’s foreign intercourse in the most famous of all Supreme Court cases, *Marbury v. Madison*, where he wrote in 1803:

By the [C]onstitution of the United States, the President is invested with certain important political powers, in the exercise of

²⁴ 4 THE DIARIES OF GEORGE WASHINGTON: 1748–1799, at 122 (John Fitzpatrick ed., 1925).

²⁵ Alexander Hamilton, *Pacificus* Number I, reprinted in ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794, *supra* note 22, at 8, 13, 16.

²⁶ YOO, *supra* note 3, at 120 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . .

. . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.²⁷

To illustrate this point, Marshall used the example of the Secretary of Foreign Affairs, whose acts he explained “can never be examinable by the courts.”²⁸

Professor Yoo seeks to distinguish between “the Constitution as it works in peacetime, when Congress authorizes a policy and the President carries it out,”²⁹ and the Constitution during periods of authorized war. This approach is not particularly useful. The Constitution prevails during war as during peace, but it allocates powers differently between the realms of domestic and foreign affairs—even during peacetime. As the Supreme Court noted in the landmark 1936 *Curtiss-Wright* case (during a period in which the United States was at peace):

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” . . .

. . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.³⁰

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165–66 (1803).

²⁸ *Id.*

²⁹ Yoo, *supra* note 3, at 119.

³⁰ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (emphasis omitted).

The President's often unchecked powers in the external realm do not depend on a declaration or state of "war"—both of which are as much anachronisms in the modern era as the power of Congress to "grant Letters of Marque and Reprisal"³¹—but on the nature of the business at hand. To the extent a matter involves America's relations with the outside world, it is the business of the Executive, save for the specific and narrowly construed exceptions enumerated in the Constitution. If a matter is primarily domestic and affects the rights of individual Americans, it is more likely within the province of Congress.

CONGRESSIONAL BLACKMAIL AND THE POWER OF THE PURSE

After arguing that the Constitution commits most decisions in foreign affairs to the President's discretion, Professor Yoo suggests that Congress is not "defenseless" and has important powers of its own.³² He writes: "Congress could refuse to confirm cabinet members, subcabinet members, or military intelligence officers unless it prevails over the NSA"³³ on the terrorist surveillance program. It also "has total control over funding" and "can cut off funds."³⁴

Professor Yoo is of course correct that no money may be expended from the treasury without an appropriation made by law.³⁵ Thus, if the President submits a request for additional funds to fight a war or to purchase new spy satellites, Congress can freely refuse the appropriation.³⁶ Without funds, few major policy initiatives can survive. Nevertheless, "like every other governmental power," the power of the purse "must be exercised in subordination to the applicable provisions of the Constitution."³⁷

Congress's power of the purse has its limits. Congress may not properly condition appropriated funds on the President surrendering to the whim of Congress discretionary authority that the Constitution vests in the Executive. For example, just last year, the Supreme Court in *Hamdan v. Rumsfeld* favorably quoted Chief Justice Salmon P. Chase's 1866 explanation in *Ex parte Milligan* of the separation of war powers:

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon

³¹ U.S. CONST. art. I, § 8, cl. 11.

³² YOO, *supra* note 3, at 122.

³³ *Id.* at 125.

³⁴ *Id.* at 122.

³⁵ See U.S. CONST. art. I, § 9, cl. 7.

³⁶ See *id.*

³⁷ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

the proper authority of the President. . . . Congress cannot direct the conduct of campaigns.³⁸

Moreover, an unlimited congressional ability to control other branches by conditional appropriations is incongruous with a system of government founded on a separation of powers. For example, Congress could, if the power of the purse were unlimited, condition appropriations for the Supreme Court on the Justices appearing on demand to discuss the resolution of pending cases, and Congress could dictate the outcome of pending cases merely by providing that they would not make funds for the judiciary available unless the Court struck down an unpopular precedent or upheld a controversial statute.

In addition, not only could Congress restrict the judiciary, but by this same logic, Congress could control government employees as well. For example, Congress could use this approach to bypass the prohibition against bills of attainder in Article I, Section 9 of the Constitution merely by providing that no funds could be made available to pay the salaries of certain named government employees who had incurred the wrath of important legislators. Indeed, Congress abused this very power during World War II by placing a rider on the Second Deficiency Appropriations Act of 1943³⁹ prohibiting the use of appropriated funds to pay the salaries of three alleged “communists” who worked for the government.⁴⁰ In 1946, the Supreme Court struck down this unconstitutional bill of attainder.⁴¹ Over the years the Court has frequently used the “unconstitutional conditions doctrine” to strike down legislative attempts to use the “power of the purse” to accomplish indirectly what the Constitution prohibits the legislature from doing directly.⁴²

In 1790, Thomas Jefferson raised the issue of abusing legitimate powers to usurp the powers of another branch of government when he noted the possibility of the Senate attempting to control executive discretion over issues of diplomacy by “continual negatives” on the President’s ambassadorial nominees until he agreed to the Senate’s

³⁸ Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006) (plurality opinion) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139–40 (1866)).

³⁹ 57 Stat. 552 (1943).

⁴⁰ *United States v. Lovett*, 328 U.S. 303, 305, 308–09 (1946). The bill contained essential money for the prosecution of the war and thus a veto could have endangered the war effort. Fortunately, President Roosevelt used a signing statement to declare the provision without legal effect. *Id.* at 318. For a discussion of the recent controversy over signing statements, see Robert F. Turner, *Presidential Signing Statements*, WASH. TIMES, Aug. 6, 2006, at B04.

⁴¹ U.S. CONST. art. I, § 9, cl. 3; *Lovett*, 328 U.S. at 318.

⁴² See, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006).

terms.⁴³ But Jefferson reasoned that “this would be a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable.”⁴⁴ Given Professor Yoo’s strong views on protecting the President’s constitutional powers, it is surprising that he recognizes these indirect attacks as appropriate.⁴⁵

IS THE “WAR ON TERRORISM” REALLY A WAR?

Chapter One of *War by Other Means* is entitled “War,” and addresses whether America really is at war with al Qaeda and its allies. Professor Yoo quotes historian Joyce Appleby as declaring that the “war on terror” is “more a metaphor than a fact.”⁴⁶ Yale Law School Professor Bruce Ackerman similarly declares that “‘War on terror’ is, on its face, a preposterous expression.”⁴⁷ On this issue—recognizing that the war against al Qaeda is *sui generis*⁴⁸—Professor Yoo correctly asserts that the United States is at war. While the nation is not at war with every terrorist group in the world, it is at war with al Qaeda, the Taliban, and the groups that assisted them in the 9/11 attacks.

It is apparent that the United States is at war and that the “war on terrorism” is not merely a metaphor similar to the “war on poverty,” because Congress, the Supreme Court, and even the United Nations have consistently recognized that the country is at war. On September 12, 2001, the day after the 9/11 attacks, the UN Security Council unanimously approved Resolution 1368,⁴⁹ which denounced the attacks and reaffirmed “the inherent right of individual or collective self-defence”⁵⁰ embodied in Article 51 of the UN Charter—language not of law enforcement but of armed conflict. On that same day, NATO’s North Atlantic Council issued a unanimous statement that “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered

⁴³ Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961).

⁴⁴ *Id.* at 378, 379.

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ YOO, *supra* note 3, at 2.

⁴⁷ BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 13 (2006).

⁴⁸ YOO, *supra* note 3, at 17 (“[I]t is a different kind of war, with a slippery enemy that has no territory, population, or uniformed, traditionally organized armed forces . . .”).

⁴⁹ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

⁵⁰ U.N. Charter art. 51, para. 1 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”).

an attack against them all.”⁵¹ This, too, is the language of armed conflict and not of law enforcement.

On September 18, 2001, Congress—the body authorized by the Constitution “to declare War”⁵²—enacted a joint resolution authorizing “the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.”⁵³ Again, Congress used the language of armed conflict and not of law enforcement. The statute referenced the right of “self-defense”⁵⁴ and declared that it satisfied the requirements of the 1973 War Powers Resolution.⁵⁵ On September 20, 2001, President Bush went before a joint session of Congress and declared: “On September the 11th, enemies of freedom committed an act of war against our country.”⁵⁶ During this address, he repeatedly made references to the nation being at “war.”⁵⁷

Finally, as Professor Yoo correctly observes, in its 2004 *Rasul*⁵⁸ and *Hamdi*⁵⁹ decisions, the Supreme Court “confirmed as a matter of law that the war against the al Qaeda terrorist network and the Taliban militia was indeed a war . . . authorized by Congress.”⁶⁰ In a setting where the UN Security Council has affirmed the United States’ right of self-defense, NATO allies have joined the United States on the battlefield, and all three branches of the U.S. government have formally asserted that the country is at “war,” it seems a bit presumptuous for American professors to proclaim that the current conflict is merely a metaphor like the “war on poverty.”

On September 25, 2001, Deputy Assistant Attorney General Yoo signed a legal opinion concluding that the United States was “at war” and asserting that the President had constitutional authority to order the use of force abroad “alone, if necessary, without Congress’s authorization.”⁶¹ While some may view this statement as but another vast claim of executive power, Yoo’s assertion was accurate. When James Madison moved on August 17, 1787, to change the draft constitution by deleting the power of Congress “to make war” and inserting

⁵¹ Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

⁵² U.S. CONST. art. I, § 8, cl. 11.

⁵³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁵⁴ *Id.* (explaining that the September 11 attacks made it “both necessary and appropriate that the United States exercise its rights to self-defense”).

⁵⁵ *Id.*

⁵⁶ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

⁵⁷ *Id.*

⁵⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁵⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁶⁰ YOO, *supra* note 3, at 130.

⁶¹ *Id.* at 10–11.

in its place the more limited power “to declare war,” he justified the change as leaving “to the Executive the power to repel sudden attacks.”⁶² During the ensuing debate, when Rufus King of Massachusetts explained that “‘make’ war might be understood to ‘conduct’ it which [is] an Executive function,”⁶³ Connecticut changed its vote and Madison’s motion carried with it only one dissenting vote.⁶⁴

Indeed, even the controversial 1973 War Powers Resolution recognized the constitutional power of the President to act unilaterally in such a setting:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to . . . (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.⁶⁵

THE GENEVA CONVENTIONS

Professor Yoo’s second chapter discusses the 1949 Geneva Conventions, which have been at the center of much of the post-9/11 legal debate in America. Unfortunately, ignorance has driven the debate. For example, some critics have sincerely argued that it is unlawful for the U.S. government to detain enemy combatants without affording them a day in court and access to legal counsel.⁶⁶

In reality, for centuries it has been standard practice during armed conflicts to detain enemy combatants for the duration of the conflict. During World War II, the United States held more than 400,000 German and Italian prisoners of war (POWs)⁶⁷ in more than forty American states without providing them with legal counsel or a day in court. In the Vietnam War, American pilots were imprisoned without due process as POWs in North Vietnam from 1964 until 1973 without a single outcry from the United States (although America did complain that the POWs were being tortured).

Being a prisoner of war does not carry with it any connotation of being a wrongdoer; a POW is merely a soldier who has fallen into the hands of the enemy. Various international conventions have sought to assure that POWs receive humane treatment, such as requiring that

⁶² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1966).

⁶³ *Id.* at 319.

⁶⁴ *Id.*

⁶⁵ War Powers Resolution, 50 U.S.C. § 1541(a) (2000).

⁶⁶ See, e.g., Jacob G. Hornberger, *Padilla, Hamdi, and Rasul: Charge Them or Release Them*, The Future of Freedom Foundation Commentaries, July 16, 2004, <http://www.fff.org/comment/com0407d.asp>.

⁶⁷ See LAURENCE REES, AUSCHWITZ: A NEW HISTORY 248 (2005).

they be housed away from the dangers of the battlefield and away from health hazards.

Following World War II, the world community negotiated four new Geneva Conventions dealing with the treatment of (1) wounded soldiers on the battlefield; (2) wounded and shipwrecked at sea; (3) prisoners of war; and (4) civilians under enemy control. With 194 parties, these are the most widely accepted treaties in international law.⁶⁸ There are also two 1977 protocols dealing with international and noninternational conflicts, and a 2005 protocol establishing distinctive emblems to identify religious and medical personnel as noncombatants.

Of primary relevance in the war against terrorism is the third 1949 treaty, the Convention Relative to the Treatment of Prisoners of War, which in Article 4 bases POW status on membership in the armed forces of a party to the conflict or membership in a militia group that meets four criteria, including “conducting their operations in accordance with the laws and customs of war.”⁶⁹ As Professor Yoo admits, determining the status of Taliban combatants is “a much more difficult question”⁷⁰ than determining the status of al Qaeda combatants, who most agree are not entitled to POW status.

At its core, the status of Taliban combatants turned on whether the United States had gone to war against the country of Afghanistan or had entered the territory of Afghanistan to fight against an armed nongovernmental organization that had seized control over much of the country. During the Vietnam War, the United States had no diplomatic relations with the Democratic Republic of (North) Vietnam, but everyone recognized that there was a *de facto* government in Hanoi that was a party to the Geneva Conventions. Although Professor Yoo asserts that just before the start of the war in Afghanistan the State Department asserted that “[t]here is no functioning central government” in Afghanistan,⁷¹ the State Department later maintained that Taliban combatants should be entitled to the full protections of the Third Convention.

The UN Security Council complicated matters when it passed a series of resolutions under Chapter VII of the Charter that clearly refused to recognize the Taliban as the *de jure* or *de facto* government

⁶⁸ See INT'L COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 12-OCT-2007, at 1, 6 (2007), [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

⁶⁹ Geneva Convention Relative to the Treatment of Prisoners of War art. 4(2)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

⁷⁰ YOO, *supra* note 3, at 26.

⁷¹ *Id.* at 27.

of Afghanistan.⁷² Rather, the resolutions referred to the Taliban as “the Afghan faction known as the Taliban.”⁷³ While officers in the Peoples’ Army of (North) Vietnam (PAVN) held commissions from their government, wore uniforms with identifiable insignia, and viewed themselves as members of the national armed forces, it was far less clear that Taliban combatants held any such commissions or thought of themselves as more than the military arm of a religious force that had taken over much of the territory of Afghanistan. Unlike other national armies, Taliban combatants wore no uniforms or national insignia to identify themselves as members of a national army. In the end, a decision was made that the Taliban combatants did not qualify for POW protections as members of the national armed forces of Afghanistan; because they did not wear a “fixed distinctive sign recognizable at a distance” or “conduct [] their operations in accordance with the laws and customs of war,” the Taliban combatants did not qualify for protection as a “militia” or “volunteer corps.”⁷⁴

Excluding the Taliban from the full protections of the Third Geneva Convention, however, does not end the debate. Common Article 3, included in all four 1949 Geneva Conventions, provides minimal standards of protection “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁷⁵ These included:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

• • • •

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment.⁷⁶

Professor Yoo incorrectly seems to argue that Common Article 3 does not apply to the war on terrorism: “Bush administration critics

⁷² See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

⁷³ See, e.g., S.C. Res. 1267, *supra* note 72, ¶ 1; S.C. Res. 1333, *supra* note 72.

⁷⁴ Geneva Convention, *supra* note 69, art. 4(2)(b), (d).

⁷⁵ *Id.* art. 3.

⁷⁶ *Id.*

make the erroneous claim that U.S. treatment of al Qaeda terrorists violates common article 3. . . . That reading ignores the text of the Geneva Conventions itself, which says that these requirements apply only to conflicts ‘not of an international character.’”⁷⁷ He appears to theorize that the war on terror is an “international” conflict because it is taking place on the territory of more than one Party to the conventions and involves armed forces from several sovereign States.⁷⁸ But Article 2 states that the full Third Geneva Convention applies to armed conflicts arising “between two or more of the High Contracting Parties” to the convention, not to conflicts that merely take place on two or more sovereign states’ territories.⁷⁹ All of the sovereign States involved in the war on terrorism are on the same side. And Common Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁸⁰ Narrowly reading this language to require that the conflict take place “in the territory of one”—and only one—of the “High Contracting Parties”⁸¹ could admittedly support Professor Yoo’s interpretation. He writes: “Common article 3 did not apply to al Qaeda because it is not fighting an internal civil war with the American government. The 9/11 attacks and the struggle with al Qaeda represented an international armed conflict that extended beyond the territory of the United States.”⁸² While the Geneva Conventions’ drafters may have focused on civil war settings when they wrote Common Article 3, the operative language is “conflict not of an international character.”⁸³ The term “international” refers not to the conflict’s location but rather to the presence of sovereign states on both sides of the conflict.⁸⁴

Although there is considerable evidence in the *travaux préparatoires* that the drafters of Common Article 3 wrote it to deal only with civil wars or revolutions within the territory of a single state,⁸⁵ the

⁷⁷ Yoo, *supra* note 3, at 25 (footnote omitted).

⁷⁸ *See id.* at 26–27.

⁷⁹ Geneva Convention, *supra* note 69, art. 2.

⁸⁰ *Id.* art. 3.

⁸¹ *Id.*

⁸² Yoo, *supra* note 3, at 25–26.

⁸³ Geneva Convention, *supra* note 69, art. 3.

⁸⁴ *See id.*

⁸⁵ For example, Pictet’s *Commentary* on the 1949 Geneva Conventions—published by the International Committee of the Red Cross—is replete with references to Common Article 3 as addressing “civil wars,” “insurrections,” and armed conflicts “of an internal character.” 1 JEAN S. PICTET, COMMENTARY ON THE GENEVA CONVENTIONS 38–43 (1952) (using “civil war” well over a dozen times, along with “armed conflicts . . . of an internal character,” “insurrections,” “social or revolutionary disturbances,” and conflicts “within the borders of a state”); *see also* G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT’L & COMP. L. 253, 268 (1983) (describing Common Article 3 as “the sole

“ordinary meaning”⁸⁶ of the language strongly suggests it applies to transnational armed conflicts in which sovereign states are not involved on both sides. The drafters of the Geneva Conventions presumably included the reference to a noninternational conflict taking place in the territory of a treaty party to omit conflicts that occurred outside the territory of any party to the convention, as the treaty could not impose obligations on nonparty states.

Similarly, the participation of Great Britain and numerous other sovereign states and treaty partners in the war on terrorism does not make it an international conflict. The key consideration is whether the conflict is “between” two or more sovereign states. If it is, the full Geneva Conventions apply; if it is not, then only the minimal protections of Common Article 3 apply. In its 2006 *Hamdan* decision, the Supreme Court held that Common Article 3 *does* apply to the war on terrorism, which for purposes of U.S. law currently settles the matter.⁸⁷

In the alternative, Professor Yoo notes: “Al Qaeda violates every rule and norm developed over the history of war. Flagrant breach by one side of a bargain generally releases the other side from the obligation to observe its end of the bargain.”⁸⁸ In most settings, reciprocity is indeed an important principle of international law. It was an expressed condition in many of the early drafts to Common Article 3, but in the end it was dropped.⁸⁹ The doctrine of reprisal also permits one party to a treaty to lawfully violate its treaty obligation in response to a prior material breach by the other party. However, Article 13 of the Third Geneva Convention expressly *prohibits* reprisals against POWs.⁹⁰

Finally, in his Epilogue, Professor Yoo suggests that Congress “could pass a one-sentence amendment to the [Uniform Code of Military Justice] . . . making clear that the Geneva Conventions, not even common article 3, do not apply to the war on terrorism.”⁹¹ True enough, and under the “latest in time” rule,⁹² American courts would be bound by the amended statute rather than the earlier treaty. How-

article in each of the four Conventions that deals exclusively with so-called ‘internal armed conflicts’”).

⁸⁶ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁸⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2757 (2006) (“The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations.” (quoting Geneva Convention, *supra* note 69, art. 3)).

⁸⁸ YOO, *supra* note 3, at 23.

⁸⁹ See 1 PICTET, *supra* note 85, at 41, 51–52.

⁹⁰ Geneva Convention, *supra* note 69, art. 13 (“Measures of reprisal against prisoners of war are prohibited.”).

⁹¹ YOO, *supra* note 3, at 235.

⁹² See *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888).

ever, such a statute would not alter the fact that the United States would still be violating its solemn treaty commitments. Indeed, because torture and the inhumane treatment of detainees during war are war crimes, there is at least some risk that legislators who supported such an amendment might someday be subjected to war-crimes prosecutions by one of the 193 other states who are parties to the conventions.⁹³

ASSASSINATIONS AND TARGETED KILLINGS

Professor Yoo's third chapter addresses the issue of "assassination" and discusses such examples as the November 4, 2002, use of a Predator drone to fire a Hellfire missile in Yemen to kill Abu Ali al-Harithi and five other al Qaeda operatives.⁹⁴

In the interest of full disclosure, I should acknowledge that I authored an article in the *Washington Post* in October 1990 that helped to initiate the modern debate on this issue.⁹⁵ In that article, I argued that using lethal force in self-defense against the mastermind of a major act of ongoing international aggression was neither "assassination" (generally defined as a form of murder) nor illegal.⁹⁶ Eight years later, I penned a similar article for *USA Today* arguing that Osama bin Laden was a lawful target.⁹⁷ Not surprisingly, I agree with Professor Yoo that it is permissible to kill enemy leaders as well as their underlings during wartime so long as the weapon used is lawful. There may be serious issues concerning the permissible level of collateral damage,⁹⁸ but states may lawfully kill enemy combatants and their leaders during wartime. To mention but one precedent, during World War II the United States intentionally targeted an aircraft carrying Admiral Yamamoto.⁹⁹

Professor Yoo notes that some critics point to the prohibition contained in Executive Order 12,333 against "assassination" by anyone employed by or working on behalf of the U.S. Government.¹⁰⁰ As the senior White House attorney charged specifically with enforcing that Executive Order after President Reagan promulgated it in December 1981 until my departure to the Department of State in 1984, I am

⁹³ See INT'L COMM. OF THE RED CROSS, *supra* note 68, at 2–6.

⁹⁴ See YOO, *supra* note 3, at 48–49; see also *id.* at 48 (identifying al-Harithi as involved in planning the 2000 bombing of the U.S.S. *Cole*).

⁹⁵ Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1.

⁹⁶ See *id.*

⁹⁷ See Robert F. Turner, *In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden*, USA TODAY, Oct. 26, 1998, at 17A.

⁹⁸ For a useful discussion of some of these limitations, see Yoo, *supra* note 3, at 64–69.

⁹⁹ See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 5 (authored by my good friend).

¹⁰⁰ See YOO, *supra* note 3, at 51–52.

confident that the President did not intend it to prevent the intentional killing of enemy leaders during wartime. Although the Executive Order does not define “assassination,” the term clearly does not encompass killings in legitimate self-defense.¹⁰¹

Surprisingly, in this chapter Professor Yoo confuses legitimate acts of self-defense with assassinations. In discussing America’s right to attack Libyan leader Muammar Qadhafi in 1986 in response to Libyan terrorism, Professor Yoo writes: “Of course, under this rule, the targeting of the White House and Pentagon on 9/11 was legal, although the method of the attack was not because of the hijacking of civilian airliners.”¹⁰² I disagree profoundly. As the leader of a sovereign state, Qadhafi had certain rights under international law. These did not include the right to order terrorist attacks on foreigners, but they did include the right—the same right President Reagan exercised on April 15, 1986¹⁰³—to authorize necessary and proportional acts of self-defense in response to an armed attack by another state. As a nongovernmental organization, al Qaeda has no lawful right under international law to use force of any kind against the United States.

THE PATRIOT ACT

Professor Yoo correctly asserts that “FDR took far more liberties with the constitutional law of the day than the current administration does.”¹⁰⁴ Unlike any of his wartime predecessors, President Bush responded to the 9/11 attacks by immediately going to Congress and requesting additional statutory authority for the war on terrorism. The result was the USA PATRIOT Act of 2001 (Patriot Act).¹⁰⁵ Professor Yoo devotes a useful chapter to this legislative response to 9/11, asserting that all initial proposals for legislative change came not from political appointees but from career government lawyers.¹⁰⁶ Many of the proposals sought to apply authorities that other governmental agencies had used against organized crime or drug dealers and which courts had upheld.¹⁰⁷ Additionally, the Justice Department had previ-

¹⁰¹ See Robert F. Turner, *It’s Not Really “Assassination”*: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites, 37 U. RICH. L. REV. 787, 791–98 (2003).

¹⁰² YOO, *supra* note 3, at 64.

¹⁰³ For details of the 1986 U.S. attack on Libya, see Robert F. Turner, *International Law, the Use of Force, and Reciprocity: A Comment on Professor Higgins’ Overview*, 25 ATLANTIC COMMUNITY Q., Summer 1987, at 160, 165–67.

¹⁰⁴ YOO, *supra* note 3, at 222.

¹⁰⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

¹⁰⁶ See YOO, *supra* note 3, at 71.

¹⁰⁷ See *id.* at 76.

ously requested several of the proposals under presidents of both parties.¹⁰⁸

The Patriot Act provision for roving wiretaps¹⁰⁹ is a good example of Congress bringing American counterintelligence into the twenty-first century. Traditionally, court orders authorized the monitoring of a single telephone line or a single e-mail account.¹¹⁰ Modern criminals often buy several prepaid cellular telephones and discard each after a few hours of use.¹¹¹ They also often change their e-mail accounts regularly. There was every reason to suspect terrorists might use the same tactics, so Congress responded with section 206 of the Patriot Act which authorized the surveillance of any phone or e-mail account used by a designated individual.¹¹² Permitting United States counter-terrorism agents to use tools already approved for law-enforcement use against organized crime and white-collar criminals hardly constituted a major new threat to civil liberties.

A greatly overstated allegation was that section 215 of the Patriot Act authorized the government to examine the library records of citizens. In reality, as Professor Yoo recognizes, section 215 did not even mention libraries.¹¹³ Rather, section 215 permits the government to obtain “business records”—documents courts have long held are not protected by the Fourth Amendment¹¹⁴—through the use of a Foreign Intelligence Surveillance Act (FISA) warrant issued by a federal judge.¹¹⁵ For years, grand juries have been able to obtain these same types of records without warrants.¹¹⁶

Why would the government wish to examine library records? Because the 9/11 terrorists used public library computers in preparation for their attacks.¹¹⁷ Allowing FBI investigators to examine library records pursuant to judicial warrants could help prevent the next attack and save thousands of lives. Professor Yoo notes that the librarians’ claim to an exemption would give them the kind of privilege currently limited to communications with doctors, lawyers, priests,

¹⁰⁸ See *id.* at 71.

¹⁰⁹ USA PATRIOT Act § 206.

¹¹⁰ See Yoo, *supra* note 3, at 78.

¹¹¹ See Michelle Krish, *Criminals Now Using Prepaid Cell Phones as Weapons*, 10NEWS.COM, May 4, 2007, <http://www.10news.com/newsarchive/13262329/detail.html>.

¹¹² See USA PATRIOT Act § 206; Yoo, *supra* note 3, at 78–79.

¹¹³ See Yoo, *supra* note 3, at 78 (“[Section 215] applies to all businesses that keep records, of which libraries are only one.”).

¹¹⁴ See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976) (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”).

¹¹⁵ See USA PATRIOT Act § 215.

¹¹⁶ See Yoo, *supra* note 3, at 77.

¹¹⁷ See *id.*

and spouses,¹¹⁸ which makes little sense given the stakes in the war on terrorism.

Of course, given the speed with which the Patriot Act was put together and rushed through Congress, the statute is certainly not perfect. Over time, Congress will no doubt make appropriate adjustments, increasing governmental authorities in some areas and narrowing them in others. Regardless, I believe Professor Yoo does a good job in explaining and defending the statute.

WARRANTLESS ELECTRONIC SURVEILLANCE

Chapter Five addresses “The NSA and Wiretapping.” However, the chapter provides little substantive information on the Terrorist Surveillance Program (TSP) because, as Professor Yoo writes, “Justice Department officials have prohibited [him] from responding directly to the accounts in the *New York Times* and in other papers.”¹¹⁹

In his introduction, Professor Yoo asserts that “[o]n the surveillance issue, the Bush administration had learned, to its credit, a few lessons from the torture controversy. It came out with a full legal justification of its actions.”¹²⁰ If only that were true. Though the Department of Justice prepared an impressive legal memorandum seeking to defend the TSP, the authors focused primarily on statutory issues rather than the far stronger constitutional arguments.¹²¹ Clearly, Congress intended FISA to be the sole means of authorizing national security wiretaps inside the United States.¹²² Section 109(a) makes it a felony to engage in “electronic surveillance under color of law except as authorized by statute.”¹²³ The Department of Justice argued—with almost no apparent success based on public discourse and media accounts—that when Congress passed the Authorization for Use of Military Force (AUMF) on September 18, 2001,¹²⁴ Congress authorized the President to collect foreign intelligence on al Qaeda. Legislators quickly dismissed this interpretation, noting that they had not intended to modify FISA by voting for the AUMF.

In reality, the Justice Department presented a reasonable statutory argument in support of a presidential power to collect foreign intelligence. Certainly, when Congress enacted the AUMF, few mem-

¹¹⁸ See *id.*

¹¹⁹ *Id.* at 100.

¹²⁰ *Id.* at ix.

¹²¹ See Memorandum from Alberto R. Gonzales, Att’y Gen. of the United States, to William H. Frist, Senate Majority Leader, Legal Authorities Supporting the Activities of the National Security Agency Described by the President to William H. Frist, former Senate Majority Leader (Jan. 19, 2006), available at <http://www.fas.org/irp/nsa/doj011906.pdf>.

¹²² See 50 U.S.C. §§ 1801–1809 (2000 & Supp. IV 2004).

¹²³ *Id.* § 1809(a)(1).

¹²⁴ S.J. Res. 23, 107th Cong. (2001) (enacted).

bers envisaged the legislation as a change to the Non-Detention Act of 1971, which provides: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹²⁵ Yet the Supreme Court, in the 2005 *Hamdi* case, decided that the AUMF had authorized “so fundamental and accepted an incident to war” as detaining U.S. citizens who join the al Qaeda cause.¹²⁶ The Court did not find that the AUMF amended the Non-Detention Act but rather that it satisfied the requirement that detention be pursuant to an Act of Congress.¹²⁷ And certainly if detaining U.S. citizens constitutes a “fundamental . . . incident to war,”¹²⁸ then collecting intelligence on the enemy—often a prerequisite to the effective use of armed force—must also constitute such a fundamental incident. So, in light of the *Hamdi* decision, the Justice Department acted reasonably on a statutory argument to support the President’s surveillance activities.

Even so, the constitutional arguments comprise the strongest case in favor of a presidential power to collect foreign intelligence. When Congress accused the President of breaking the law, he could have asked to address a joint session of Congress and argued his case. In response to assertions that the idea of unchecked presidential power was reminiscent of King George III, he could have quoted John Marshall in *Marbury* asserting that the Constitution confides certain powers entirely to the President’s discretion and that an act of the Legislature repugnant to the Constitution is void.¹²⁹ He could have read from *The Federalist No. 64*, where John Jay explained that because Congress could not be trusted to keep secrets, the Constitution left the President “able to manage the business of intelligence as prudence might suggest.”¹³⁰

The President additionally might have noted that Henry Clay, among the most famous members of the House of Representatives in American history, declared in 1818 that Congress could not properly inquire into expenditures for intelligence matters.¹³¹ Clay’s sentiment coincided with early appropriations for foreign affairs, which provided:

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable

¹²⁵ 18 U.S.C. § 4001(a) (2000).

¹²⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2003).

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165–72 (1803).

¹³⁰ THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961).

¹³¹ *See* 32 ANNALS OF CONG. 1466 (1818).

not to specify, and cause a regular statement and account thereof to be laid before Congress annually¹³²

The President could have further relied on the 1967 *Katz* case,¹³³ in which the Supreme Court first held that government wiretaps constituted a “seizure” under the Fourth Amendment, yet expressly excluded “national security” wiretaps from its holding.¹³⁴ The following year, Congress enacted the first wiretap legislation, recognizing the President’s independent constitutional power in this area:

Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.¹³⁵

In fact, Congress did not begin demanding control over foreign intelligence until the 1970s. The Legislature premised FISA on a false assertion that the Supreme Court’s decision in the 1972 *Keith* case¹³⁶ had “invited” Congress to legislate in the area of foreign intelligence.¹³⁷ In reality, the Court addressed the issue of purely *domestic* national security wiretaps in *Keith*.¹³⁸ Indeed, speaking for a unanimous Supreme Court, Justice Powell repeatedly emphasized that the case did not address the President’s constitutional power to authorize warrantless national-security wiretaps of foreign powers or their agents in the United States.¹³⁹ Justice Powell did not suggest that Congress seize control over the collection of foreign intelligence but rather suggested that Congress consider new legislation with respect to purely *domestic* national-security threats, unrelated to any foreign power.¹⁴⁰

¹³² Act of July 1, 1790, ch. 22, 1 Stat. 128, 129.

¹³³ *Katz v. United States*, 389 U.S. 347 (1967).

¹³⁴ *See id.* at 353, 358 n.23.

¹³⁵ 18 U.S.C. § 2511(3) (2000).

¹³⁶ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972).

¹³⁷ *See Modernization of the Foreign Intelligence Surveillance Act: Hearing on H.R. 5825 Before the H. Permanent Select Comm. on Intelligence*, 109th Cong. 3 (2006) (statement of Kate Martin, Director, Center for National Security Studies), available at intelligence.house.gov/media/pdfs/CNSSStatmentRecord.pdf.

¹³⁸ *See Keith*, 407 U.S. at 321–22.

¹³⁹ *See id.* at 308, 321–22 (“It is important at the outset to emphasize the limited nature of the question before the Court. . . . [T]he instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country. . . . We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.” (footnote omitted)).

¹⁴⁰ *See id.* at 322 (“Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that *domestic* security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime.’ . . . Given these potential distinctions between Title III

Instead, Congress used the occasion to pass the *Foreign Intelligence Surveillance Act*.

In support of his surveillance activities, the President might also have quoted the testimony of President Carter's Attorney General, Griffin Bell, who reminded the Senate that, as a mere statute, FISA could not deprive the President of a power conferred by the Constitution.¹⁴¹ Perhaps even more persuasively, he might have noted that FISA established not only the FISA Court but also a FISA Court of Review composed of Federal Appeals Court judges appointed by the Chief Justice.¹⁴² And in 2002, the unanimous FISA Court of Review observed that every federal court that has decided the issue has held that the President does have inherent constitutional authority to conduct warrantless searches to obtain foreign intelligence information.¹⁴³ The Court of Review stated: "We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power."¹⁴⁴

The President should also have noted that, when addressing issues of public safety, the Supreme Court has long held that Fourth Amendment "searches" do not always require individualized suspicion, probable cause, or a warrant. For example, in the 1989 *Von Raab* case, the Court explained:

While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, . . . our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.¹⁴⁵

criminal surveillances and those involving the *domestic* security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III." (emphasis added)).

¹⁴¹ See *Foreign Intelligence Surveillance Act of 1977: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the H. Subcomm. on Legis. of the Permanent Select Comm. on Intelligence*, 95th Cong. 15 (1978) (statement of Griffin Bell, Att'y Gen. of the United States).

¹⁴² See *Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C. § 1803(a) (Supp. IV 2004).

¹⁴³ See *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

¹⁴⁴ *Id.*

¹⁴⁵ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (citations omitted).

With regard to this balancing test, the Court has repeatedly noted that “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”¹⁴⁶ In *Von Raab* the Court cited the search of airline passengers to prevent hijackings or acts of terror as an example of a Fourth Amendment search that did not require a warrant:

The point is well illustrated also by the Federal Government’s practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches . . . the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:

“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage”¹⁴⁷

Next, the President might have cataloged some of the damage to American national security caused by this congressional usurpation of his authority. He might have noted that FBI lawyer Colleen Rowley could not obtain a warrant to examine Zacharais Moussaoui’s laptop computer because Congress failed to anticipate the possibility that a “lone-wolf” foreign terrorist might be a legitimate subject for government surveillance and not because of bureaucratic incompetence at the FBI’s Washington headquarters. The FBI lawyers merely enforced the law. In December 2004, Congress quietly amended FISA to permit warrants for lone-wolf terrorists.¹⁴⁸

General Michael Hayden, who served as Director of the National Security Agency from 1999 to 2005, told an audience at the National Press Club in early 2006: “Had [the NSA terrorist surveillance program] been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.”¹⁴⁹ While

¹⁴⁶ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

¹⁴⁷ *Von Raab*, 489 U.S. at 675 n.3 (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)) (citations omitted).

¹⁴⁸ See 50 U.S.C. § 1801(b)(1)(C) (Supp. IV 2004).

¹⁴⁹ General Michael Hayden, Principal Deputy Director of National Intelligence, Office of National Intelligence, Former Dir. of Nat’l Sec. Agency, Address to the National Press Club: What American Intelligence & Especially the NSA Have Been Doing to Defend the Nation (Jan. 23, 2006), available at <http://www.fas.org/irp/news/2006/01/hayden012306.html>.

General Hayden did not say that had the NSA and FBI identified these al Qaeda operatives, they would have tracked their activities and quite possibly prevented the 9/11 attacks, one can easily imagine such an outcome.

Ultimately, the TSP dispute turns not on whether the President thinks he is “above the law” but on which “law” is superior: the Constitution or a mere statute passed by Congress. To solve the dispute, the President would only need to quote John Marshall. Instead, the Administration relied on the argument that the AUMF had somehow changed FISA. Irrespective of the actual merits of the issue, even in the legal community, this argument did not pass the straight-face test with many people. Professor Yoo concludes: “Commonsense changes in surveillance law earlier might have stopped al Qaeda before they murdered three thousand people.”¹⁵⁰ I believe he is correct.

GUANTANAMO, DETAINEE TREATMENT, AND MILITARY COMMISSIONS

Chapters Six through Eight address the related issues of the detention facility at Guantanamo Bay, Cuba, interrogation techniques and “torture,” and the use of military tribunals in the war on terrorism. Professor Yoo does well to address these issues both because he played a key role on each issue during his government service and because criticism of the Administration’s handling of the war has largely focused on these issues.

On some of these issues, Professor Yoo provides excellent commentary. He correctly notes that “[t]he rules of war permit the capture and detention of the enemy without trial, because the purpose of detention is to remove combatants from action.”¹⁵¹ He also correctly observes that “[e]ven under the Geneva Conventions, . . . a POW has no right to an attorney unless he is being tried for violations of the laws of war.”¹⁵²

Perhaps most controversially, though, Professor Yoo defends the Bush Administration’s interrogation techniques. Because he does not recognize that Common Article 3 applies, Professor Yoo focuses on establishing that the techniques used to extract information fell short of torture.¹⁵³ He asserts that the well-documented abuses at Abu Ghraib “were solely the acts of individuals,” which the government did not order or authorize in any way.¹⁵⁴ Professor Yoo’s assertion is con-

¹⁵⁰ Yoo, *supra* note 3, at 97.

¹⁵¹ *Id.* at 129.

¹⁵² *Id.* at 152.

¹⁵³ *See id.* at 171.

¹⁵⁴ *Id.* at 194.

sistent with the findings of several investigatory bodies, including one headed by former Secretary of Defense James Schlesinger.¹⁵⁵

There is likely broad agreement that if the government had a “ticking time bomb” scenario involving a detainee with information that might save tens or even hundreds of thousands of innocent lives, extraordinary interrogation techniques would be morally justified even if illegal. Professor Yoo quotes Senator Charles Schumer (D-NY) as declaring during a Senate hearing that “very few people in this room or in America . . . would say that torture should never, ever be used, particularly if thousands of lives are at stake.”¹⁵⁶ Similarly, Professor Yoo notes that Senator John McCain (R-AZ) “concedes that the President ought to violate his own law if al Qaeda has hidden a nuclear bomb in New York and American intelligence captures one of the plotters. ‘You do what you have to do,’ McCain said in the fall of 2005.”¹⁵⁷

The likelihood of such a ticking time bomb scenario ever occurring is not great, and even in such a situation the effectiveness of torture at extracting usable evidence is questionable. Professor Yoo describes a case in which Filipino authorities inflicted “terrible physical abuse” on an al Qaeda operative that ultimately produced information that prevented a plot to destroy twelve U.S. airliners flying across the Pacific.¹⁵⁸ Former Director of Central Intelligence George Tenet recently remarked that the controversial CIA interrogation program has produced greater information “than the FBI, the Central Intelligence Agency, and the National Security Agency put together.”¹⁵⁹ Others claim that research shows coercive interrogation seldom works and that more traditional techniques are far more effective.¹⁶⁰

However, even if abusing detainees can produce useful intelligence, there are serious moral, legal, and prudential considerations involved. The Convention Against Torture, to which the United States is a party, does not permit any derogation, even during wartime.¹⁶¹

¹⁵⁵ See JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 5 (2004) (“The pictured abuses . . . were not part of authorized interrogations nor were they even directed at intelligence targets. They represent deviant behavior and a failure of military leadership and discipline.”).

¹⁵⁶ YOO, *supra* note 3, at 172.

¹⁵⁷ *Id.* at 172–73.

¹⁵⁸ *Id.* at 190.

¹⁵⁹ Stephen F. Hayes, Op-Ed., *The Cheney Imperative*, WALL ST. J., Aug. 15, 2007, at A13.

¹⁶⁰ See Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 641, 653 (2005) (“To be sure, there is abundant evidence that torture is not effective either as an interrogation tactic or as an information-extracting device.”).

¹⁶¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, para. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

It is important to understand that Professor Yoo was mistaken in his view that Common Article 3 did not apply to the use of coercive interrogation techniques in the war on terrorism.¹⁶² The Supreme Court has already resolved this issue in *Hamdan*.¹⁶³ Thus, any interrogation techniques that involve physical abuse or constitute inhumane treatment are violations of the Geneva Conventions. Serious physical abuse of detainees is a war crime for which everyone involved—U.S. interrogators, their superiors who know or should know of their activities, and others up the chain of command who ordered, facilitated, or otherwise bear responsibility for the abuse—is liable, and any of the 193 other parties to the Conventions may try them as war criminals. This is a serious matter, particularly because there is no statute of limitations for war crimes¹⁶⁴ and the U.S. government has an obligation to protect its employees from such risks by not directing or authorizing conduct that constitutes a war crime.

Professor Yoo makes an interesting argument that during wartime, U.S. Presidents have the constitutional power to violate international law, as well as legislative statutes, that they feel improperly infringe on their constitutional powers.¹⁶⁵ On the first point he is certainly right.¹⁶⁶ He is correct on the second point as well, to the extent that that statute exceeds the clear constitutional powers of Congress and usurps executive discretion. However, in this instance it is not clear that Professor Yoo gave sufficient attention to the expressed power of Congress to “define and punish . . . Offenses against the Law of Nations.”¹⁶⁷ On the issue of torture and detainee treatment, I also fear that Professor Yoo and his colleagues in the Bush Administration may have focused too heavily upon clever legal arguments and not enough on wise public policy. Even if Presidents do have the power to disregard the law, it does not follow that they should exercise that

¹⁶² Yoo, *supra* note 3, at 235–36 (“The Court only addressed the use of military commissions [in *Hamdan*]. It did not hold them unconstitutional, nor did it revisit its *Hamdi* decision of two years ago which allows the government to hold terrorists until the end of fighting. . . . It limited itself to interpreting two provisions of the UCMJ, one which declared that passage of the UCMJ was not meant to deprive military commissions of their usual jurisdiction, and another requiring the use of courts-martial procedures except where not practical.”).

¹⁶³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795–96 (2006) (plurality opinion) (holding that Common Article 3 applies to cases involving al Qaeda members even though they are not associated with parties that are signatories to the treaty).

¹⁶⁴ See Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes Against Humanity art. 1(a), Nov. 26, 1968, 754 U.N.T.S. 73, available at http://www.unhchr.ch/huml/menu3/b/p_limit.htm.

¹⁶⁵ See Yoo, *supra* note 3, at 183–86.

¹⁶⁶ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 & cmt. a (1987); LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 175–77 (4th ed. 2001); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 244 (2d ed. 1996).

¹⁶⁷ U.S. CONST. art. I, § 8, cl. 10.

power. The United States benefits tremendously from international law, and electing to violate the Geneva Conventions will weaken the country's credibility to enforce other rules against other states, including Iran's and North Korea's obligations under the Nuclear Non-Proliferation Treaty.

Professor Yoo's discussion of the use of military tribunals is more impressive than his discussion of abusive interrogation techniques, and he provides anecdotal accounts to illustrate the risks and difficulties of prosecuting terrorists in federal district courts. Professor Yoo also raises important questions about the modern trend in Congress of providing civil remedies to foreign nationals who assert that U.S. government employees have violated their rights, even when the employee acted in good faith during times of war or national security emergency. Does the United States really want al Qaeda operatives to have access to our courts and perhaps reap millions of dollars in damages as opposed to dealing with misconduct administratively (e.g., by demoting or even discharging a government employee who fails to comply with established minimization procedures) or perhaps using the criminal justice system to punish flagrant and intentional violations of the law? Professor Yoo quotes Justice Robert Jackson in the majority opinion in the 1950 *Eisentrager*¹⁶⁸ case as observing:

[I]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.¹⁶⁹

Professor Yoo asserts that during the trial of Omar Abdel Rahman, the so-called "blind sheikh" convicted of masterminding the 1993 World Trade Center bombing, the defendant used rules of discovery to compel the Government to disclose the names of two hundred "unindicted coconspirators," and the list was delivered to Osama bin Laden within days after the Government produced it in court.¹⁷⁰ Presumably, this treasure trove of information informed bin Laden who among his agents had been compromised and who could be used for terrorist attacks because their identities had not yet become known to American intelligence agencies. Professor Yoo also contends that Zacharias Moussaoui, the only plotter of the 9/11 attacks to stand trial,¹⁷¹ used the American criminal justice system "to force the government to reveal important secrets in the war against al

¹⁶⁸ Johnson v. Eisentrager, 339 U.S. 763 (1950).

¹⁶⁹ Yoo, *supra* note 3, at 157.

¹⁷⁰ *Id.* at 212.

¹⁷¹ *See id.* at 210.

Qaeda.”¹⁷² Indeed, he points to the Moussaoui trial as “clear evidence” that civil courts are not the solution to the war on terrorism.¹⁷³

Whether disclosures result from judicial proceedings or from more traditional leaks by members of Congress or the Executive branch, the harm can be devastating. Professor Yoo writes that “just hours after information leaked in the 1990s that U.S. intelligence could intercept calls on bin Laden’s cell phone, he stopped using it.”¹⁷⁴

Professor Yoo also argues that the Bush Administration’s biggest policy failure was its inability to actually try terrorists. He complains:

Nearly five years later, the Defense Department still hasn’t tried a single terrorist. Military commissions have been the Bush administration’s most conspicuous policy failure in the war against al Qaeda. The delay has been due to the sheer multitude of issues involved in building a working court system from scratch. There were no off-the-shelf procedures or lists of war crimes to use. The Defense Department wanted a showcase of military justice at its finest, with rules of substance and procedures that would withstand any scrutiny, both at home and abroad. It was a laudable goal, but it inevitably led to long bureaucratic delays among all the involved agencies. . . . Military commissions became another flash point in the struggle pitting the military establishment against Rumsfeld and his civilian advisers¹⁷⁵

There is nothing wrong with using military courts to try enemy combatants in the war on terrorism so long as the procedures are just and comply with international law. Much of the knee-jerk opposition to such tribunals reflects ignorance about both military tribunals and international law. After all, American military personnel who break the law in the war on terrorism are tried by military courts. Professor Yoo writes the following about the criticism of military courts:

This viewpoint displays a serious lack of understanding of the military justice system. Millions of American servicemen and women serve today under the Uniform Code of Military Justice (UCMJ). That system has developed over many decades, and it provides a fair and open trial. Unlike our criminal trials, in which jurors are selected for their ignorance, military tribunals are populated by officers who are college graduates with extensive professional knowledge.¹⁷⁶

¹⁷² *Id.* at 217.

¹⁷³ *Id.* at 210 (“The story of Moussaoui’s trial and conviction shows why the civilian criminal justice system is inadequate to the task of fighting al Qaeda and the threat of mass attacks on American cities.”).

¹⁷⁴ *Id.* at 212.

¹⁷⁵ *Id.* at 208.

¹⁷⁶ *Id.* at 220.

Professor Yoo makes a very valid point, and, having been personally involved in defending soldiers as an Army infantry recon platoon leader nearly four decades ago, I continue to believe that the military justice system, on the whole, is better at producing just outcomes than most federal or state criminal justice systems.

However, Professor Yoo failed to make the point that international law not only permits the trial of POWs by military courts but in most circumstances mandates it. Thus, Article 84 of the Geneva Convention Relative to the Treatment of Prisoners of War provides:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.¹⁷⁷

In my view, some of the genuine “heroes” in the war against terrorism have been some of the Judge Advocates General of our uniformed services and their staffs, as well as people like former Navy General Counsel Alberto Mora, who courageously stood up and insisted that detainees be treated humanely and that military tribunals fully conform to international law and fundamental principles of fairness.¹⁷⁸ The country’s uniformed military lawyers deserve the nation’s gratitude for their courageous struggle to assure that all trials fully comply with established norms of international law.

CONCLUSION

Whatever one thinks about the issues of executive power over national security that Professor John Yoo discusses in *War by Other Means*, it is important to understand all sides of the arguments. Professor Yoo is a very able legal scholar who was a major player in the government while it addressed many of the most important legal issues of the war on terrorism. I personally think that he was right on many issues but terribly wrong on others. Regardless of how one views his contributions to this legal area, this book is important, and anyone seriously interested in understanding these issues should read it.

¹⁷⁷ Geneva Convention, *supra* note 69, art. 84.

¹⁷⁸ See YOO, *supra* note 3, at 196 (“Alberto Mora, then the Navy’s general counsel . . . protested the use of coercive interrogation and attempted to stand in the way of the working group’s conclusions.”); see also News Release, John F. Kennedy Presidential Library and Museum, Former Navy General Counsel Alberto Mora and U.S. Representative John P. Murtha Honored with the 2006 JFK Profile in Courage Award (Mar 22, 2006), <http://www.jfklibrary.org/JFK+Library+and+Museum/News+and+Press/Former+Navy+General+Counsel+Alberto+Mora+and+US+Representative+John+Murtha+Honored+with+the+2006+JFK.htm>.