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National Security and the Rule of Law

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Today, on the anniversary of the terrible attacks of 2001, national security and the rule of law is an appropriate subject to consider. We must do our utmost to ensure that nothing like 9/11 ever happens again. But also we must make certain that in devising protections against any reprise of such an attack, as well as implementing any response, should despite our efforts and, God forbid, another attack does in fact take place, that we do not diminish our values. Our values are what distinguish us from mass murderers like Al Qaeda.

Returning to look at the past and our government's response to 9/11, a noteworthy volume was published by Cambridge University press entitled "The Torture Papers" in 2005. This book consists of memoranda and reports written by U.S. government officials, many of them lawyers, to prepare the way for and authorize coercive interrogation and torture in Afghanistan, at the Guantánamo Bay detention facility, and in Abu Ghraib prison in Iraq. This volume includes the full texts of various internal legal memoranda from the Bush administration that sought to legitimize torture and argue away the rules against it. In his introduction to the volume, Anthony Lewis describes them as an "extraordinary paper trail to moral and political disaster: To an episode that will soil the image of the United States in the eyes of the world for years to come. They also provide a painful insight into how the skills of lawyers – skills that have done so much to protect Americans in the most legalized of countries – can be misused in the course of evil."

"The Torture Papers" contains the memorandum signed by Assistant Attorney General, Office of Legal Counsel, Jay S. Bybee , which in construing the U.S. federal law against torture asserts that physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death." The drafter of this memorandum was a Deputy Assistant Attorney General in OLC, a former law professor at the University of California named ~~John Yoo~~ Professor John Yoo. OLC opinions are treated as legally binding within the executive branch and because of Yoo's perceived and claimed expertise in the law of national security and presidential powers; he was given a virtually free hand in the first few years after 9/11, drafting opinions on these matters. Also, ~~John Yoo~~ he delivered answers that his clients in the office of the Vice President and the Department of Defense wanted to hear.

The Third Geneva Convention on prisoners of war lays down rules for determining whether a particular captive is a regular soldier, terrorist, spy or innocent bystander. Such a determination is to be made by a "competent tribunal". During the first Gulf War, the U.S. military held 1,196 such hearings and in most cases, the prisoners were judged to be innocent civilians. It was to be different in the administration of the second President Bush. During that post 9/11 time the lawyers at OLC argued that Al Qaeda is not a state and the Third Geneva Convention deals only with states. Further, they argued that Afghanistan under the Taliban was a "failed state" – even though the Taliban controlled most of the country and had for several years – and therefore the Third Geneva convention did not apply to the Taliban either, which was only "a militia or faction." This memorandum was sent to White House Counsel Alberto Gonzales and shortly after, in January, 2002, President Bush announced that the Geneva Convention did not apply to the prisoners at Guantánamo, referring to them as "unlawful combatants", apparently a term new to international law. Secretary of State Powell protested this decision and asked that it be rescinded. State Department Legal Advisor William H. Taft followed-up with a supporting memorandum to Gonzales asserting that observing the rules of the Geneva Convention would demonstrate that the United States "bases its conduct on its international legal obligations and the rule of law, not just its policy preferences."

Gonzales rejected the States Department position. In a memorandum to President Bush he wrote that "the nature of the new war [on terrorism] places a high premium on....the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities". This "new paradigm renders obsolete Geneva's strict limitation on questioning enemy prisoners" and made other Geneva provisions "quaint", Gonzales said. These and other memoranda became the basis for Defense Department and CIA guidelines and led directly to the abuses at Abu Ghraib, and Guantánamo and throughout Afghanistan. Donald Gregg, a longtime CIA veteran, national security advisor to Vice President George H.W. Bush, and Ambassador to South Korea in commenting on these developments said "I can think of nothing that can more devastingly undercut America's standing in the world, or, more important, our view of ourselves, than these decisions.

Professor John Yoo is acknowledged to have been directly responsible for the 2002 Bybee torture memorandum, the 2003 Yoo memorandum on interrogation of alien unlawful combatants held outside the United States and a number of other similar analyses. He also influenced other important memoranda through his membership in a small group referred to as the war council which included David Addington, counsel to the Vice President, the Defense Department General Counsel, and a few others. He established his place in the Bush administration in a memorandum that he wrote to the Deputy Counsel to the President just two weeks after 9/11 wherein he opined from his position in OLC, that the President holds "the plenary authority, as Commander in Chief and the sole organ of the nation in foreign relations, to use military force abroad". Congress has only a limited role in war powers restricted to opposing executive branch war decisions "only by exercising its powers over funding and impeachment". The Declare War Clause in the Constitution does not give Congress any power to initiate war only the judicial power to recognize that the nation was already in a legal state of war for purposes of "domestic law." From this all else flowed.

In 1996 professor Yoo published an article entitled "The Continuation of Politics by Other Means, The Original Understanding" in the California Law Review. It was richly sourced and admittedly put forward a theory contrary to the view of the overwhelming preponderance of Constitutional scholars. It is argued in the ~~Yoo argues in his~~ article that the true historical meaning of the Constitution was to establish "a system that was designed to encourage presidential initiative in war." It proved to be Professor Yoo's central work as it resulted in him being recruited into an important job in the OLC in the Bush administration. From that vantage point he authored, ghostwrote or influenced many of the most important legal memoranda in the early years that provided the legal justification for the most significant policies and practices for the so-called war on terrorism. His expansive view of the war powers of the President became the legal basis for the use of torture – or "enhanced interrogation", indefinite detention without charge, warrantless wiretapping within the United States and the assertion that neither constitutional protections nor those of domestic and international law limit the treatment of suspected terrorists. To be more specific Professor Yoo argued while in OLC as explained by Jane Cooper Alexander in her law review article "John Yoo's War Powers: The Law Review and the World" published in 2012 by the California Law Review provided the legal underpining for the following propositions:

- The President has complete authority over war and the use of military force
- Any statute attempting to regulate the President's use of military force would be unconstitutional and no law can limit the President's determination of the threat, the appropriate military response or its nature.
- Habeas corpus does not apply at Guantánamo or anywhere else outside the U.S.
- The Detention Act which prohibits the detention of American citizens except pursuant to an Act of Congress cannot interfere with the President's authority to detain U.S. citizens as enemy belligerents
- Torture as redefined means pain comparable to organ failure or death
- Acts such as waterboarding, confinement with insects and sleep deprivation up to 11 days do not violate the Torture Act

- The Geneva Conventions do not apply to the Talban or Al Qaeda
- The President is constitutionally empowered to authorize extraordinary rendition
- The President has authority to deploy the U.S. military domestically to combat terrorist activities
- The President has the power to conduct warrantless wiretapping without regard to statutory limitations
- The Fourth Amendment does not apply to domestic military operations designed to prevent further terrorist attacks
- Miranda warnings are not required in the case where individuals are detained by the military for interrogation
- The Fifth Amendment due process clause and the Eighth Amendment cruel and unusual punishment clause do not apply to enemy combatants held abroad.

This vision of the breadth of executive power once the President announces that a war is underway is truly breathtaking. Professor Yoo has been called the most important theorist of the 9/11 Constitution and a key legal architect with an unmatched impact on the war on terror. In the Bush OLC his theories flourished and were a large part of the legal justification to authorize leaders of the administration to do what they wanted to do.

But he was wrong and they were wrong. Not just wrong but, deeply flawed. Not just flawed but destructive of American ideals and in the end governmental competence as well. ~~Yoo's~~ These theories, and the justification for ~~his~~ the expansive view of presidential war power, are based on the presumption that the Founders of our country, the men that wrote the Constitution, Washington, Adams, Hamilton, Madison, Jay etc., intended in the Constitution to replicate the British government's allocation of power between Parliament and the King. Thus, the President would have primacy in war subject to only the impeachment power and the appropriation process. ~~Yoo ignores~~ Ignored are the many war powers granted to the Congress in the constitution and the numerous statements of prominent founders rejecting the

British model.

Professor Yoo argues that the Constitution today must be interpreted the way its legal framework was understood at the time of its adoption. He asserts that in the late 18th century it was the British model that was understood as the way executive and legislative branches of government were organized. Thus, he argues that this model created "the shared understanding" underlying the Framer's conception of executive power. This assertion is made in the face of the fact that largely the same group of men that wrote the Constitution approved a document just a decade before which said:

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world."

The Document then lists twenty-seven "Facts" which prove the attempt to establish a Tyranny including. "He has affected to render the Military independent of and superior to the Civil power"and "He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation."

And the Document says with respect to these abuses that "when a long train of abuses and usurpations, pursuing invariably, the same Object evinces a design to reduce [a People] under absolute Despotism, it is their right, it is their duty, to throw off such Government and to provide new Guards for their future security."

The Document concludes with: "And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other, our Lives, our Fortunes, and our sacred Honor." The same king was on the British throne in 1887 who was there in 1776. Can anyone possibly imagine that these men, having said what they said in 1776, and then fought an eight year war to implement what they said, would have any interest whatsoever in replicating a system with which to govern themselves which would take as a model the source of their oppression? Would they grant the very same powers to the President that led them to rebel against the King? This King? It is beyond reason.

It is further argued that the phrase in the Constitution granting the Congress the power "To declare War" does not give the Congress the power to initiate war, that such a declaration amounts only to announcing that actions previously taken by the President amounted to a legal state of war - and this is only for domestic purposes. But Professor Yoo purports to be an originalist, giving to the Constitution the meaning intended by the Framers. His argument is based on the change in this clause made at the Convention from the phrase "To make War", substituting "To declare War." Ignored is the fact that at Philadelphia and in the ratifying conventions in the states the words "declare" and "make" with respect to war were used interchangeably, and further ignored is James Madison's note that he and Elbridge Gerry introduced the change from "make" to "declare" leaving "to the Executive the power to repel sudden attacks."

In arguing that the President is supreme with respect to war powers, that only he can initiate war and that Congress has no role other than the appropriation process, ~~Yoo~~ also overlooked are many relevant statements by Constitutional delegates.

For example:

James Wilson who "did not consider the Prerogatives of the British Monarch as a proper guide in defining the executive powers";

Elbridge Gerry, who "never expected to hear in a republic a motion to empower the executive alone to declare war";

Roger Sherman, "the Executive should be able to repel but not commence war";

George Mason was against "giving the power of war to the Executive";

John Jay, the King can declare war and raise armies, but the President cannot "because these powers are vested in other hands";

and many others.

Lastly let us consider the following statements.

James Wilson at the Pennsylvania ratifying Convention: "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large."

Alexander Hamilton:
"It is up to Congress to make or declare war"

And of course the Constitution grants other war powers to the Congress. In addition to the power "To declare War', Congress is authorized to "grant Letters of Marque and Reprisal" (permitting the boarding of ships by citizens); "To raise and support Armies"; "To provide and maintain a Navy", and "To provide for calling forth the Militia".

Thus, it is unequivocally clear that the Framers' intended to give Congress alone the power to make or declare war except with respect to sudden attacks.

it is argued

But ~~Professor Yoo argues~~ that early Presidents used military force based on their concept of presidential primacy. But those same Presidents also acknowledged the central role of Congress. For example, Washington wrote in 1793 that "the Constitution vests the power of declaring war with Congress; therefore no offensive operation of importance can be undertaken until after they have...authorized such a measure." And Chief Justice Marshall wrote in 1801 for a unanimous Supreme Court that "the whole powers of war [are], by the Constitution of the United States vested in Congress..."

Finally, the President's plenary power over war-making is conjured from the Vesting Clause "the executive power shall be vested in a president" and the Commander in Chief clause "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States". It is contended that the Vesting Clause was designed to convey all of the powers of the British King, the implausibility of which assertion has been previously commented upon. With respect to the Commander in Chief clause it is again claimed that this is intended not just to give the President operational control of the military but all of the powers of the British king. In citing this clause the passage about the militia being only called into service by the Congress is omitted.

Perhaps one could close the discussion of this misguided theory with three comments and then briefly discuss what all this means.

Edmond Randolph

Executive power as he saw it was the "foetus of monarchy" and he declared that the Constitutional delegates "had no motive to be governed by the British government as our prototype" because the "fixed genius of the people of American require a different form of Government";

James Madison who drafted the Vesting Clause said he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive power."

Alexander Hamilton noted in The Federalist No. 69 that the president's limited power over war would "amount to nothing more than the supreme command and direction of the military and naval forces....."

Thus, it would appear that the expanded interpretation of presidential war powers based on the Constitution is made up largely out of whole cloth. The President's power over war policy is limited and the authority that he does have under the Constitution cannot in any way whatsoever justify anything even remotely comparable to Professor Yoo's expanded idea of presidential power during war. The Constitution was designed to give Congress, not the President, the ultimate power over war.

The plenary power theory which underlay the extreme claims of the Bush administration was a flawed and eccentric concept which was utilized by certain senior Bush administration figures to justify the abandonment of Americans ideals, and laws as well as international commitments to provide a legal underpinning – and freedom from later legal action – in the prosecution of the war on terror. The administration was caught by surprise by the horrific attacks of 9/11 and initially reacted appropriately with violence against Al Qaeda and the Taliban, but then driven by its ideology went on to pursue policies that seriously degraded U.S. security interests in the end. ~~Professor Yoo and~~ the OLC provided the legal underpinning for this in the early years. But the important message here is not to make too much of what happened in the past but rather to be sure that such misguided and mistaken ideas set no precedent for our future and do not guide any further government actions.

It is not true as former President Richard Nixon once famously said "It's legal if the president does it". The President is subject to the law just like any other citizen, even during wartime. There are special provisions of law which apply only in wartime but they are provisions of law. And it must be recognized that we have lived in a world for over 50 years in which presidentially authorized military actions sometimes must be taken promptly in the common defense. The ballistic missile for example has a short warning time. But these must be seen as exceptions and not open ended grants of authority to presidential willfulness. In the long run it is our ideals and our commitment to the rule of law, along with the resilience and resourcefulness of our people that make us the strong and great country that we are.