

## Mad about Yoo, or, Why Worry about the Next Unconstitutional War?

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Exactly two weeks after September 11, John Yoo, a deputy assistant attorney general in the Justice Department's Office of Legal Counsel, completed a memorandum affirming the president's "independent and plenary" authority to "use military force abroad."<sup>1</sup> Since then, Yoo has done so much to fashion a new conception of American constitutional government that Cass Sunstein has called him the "most important theorist of the 9/11 Constitution."<sup>2</sup> Yoo played an important part in formulating the Bush administration's legal policies for the War on Terror.<sup>3</sup> He argued that the Geneva conventions did not cover suspected terrorists.<sup>4</sup> He justified warrantless wiretapping on the president's orders.<sup>5</sup> He took part in drafting the so-called "Torture Memo" which indicated that interrogators could injure suspects short of organ failure, impaired bodily function, or death.<sup>6</sup>

Yoo's detailed memorandum on the president's constitutional authority to use military force, coming so soon after 9/11, provided a legal framework for the administration's foreign policy. Yoo specifically advised that the president has the "inherent executive power" to decide on his own whether to "deploy military force preemptively" against terrorist

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<sup>1</sup> Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., Office of Legal Policy, Dep't of Justice, to the Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001) [hereinafter Memorandum], available at <http://www.usdoj.gov/olc/warpowers925.htm>.

<sup>2</sup> Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21 (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)).

<sup>3</sup> JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

<sup>4</sup> Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>.

<sup>5</sup> See Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1.

<sup>6</sup> Letter from John C. Yoo, Deputy Ass't Att'y Gen., Office of Legal Policy, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>; Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct in Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

organizations or foreign states that “harbor or support them, whether or not they can be linked” to the attacks on the World Trade Center and the Pentagon.<sup>7</sup> After leaving the administration in 2003, Yoo has engaged in his own public relations offensive to promote the president’s “right” to “start wars.”<sup>8</sup> As Yoo has emerged as a leading advocate of executive wartime power, he has reoriented the constitutional debate over going to war.<sup>9</sup> A clever lawyer, Yoo has a knack for crafting arguments so those who are unfamiliar with the relevant constitutional history will have difficulty evaluating his evidence and logic. Praise for Yoo’s work reinforces his efforts to shape public opinion.<sup>10</sup> He has his critics, to be

<sup>7</sup> Memorandum, *supra* note 1. President Bush claimed “full authority” under the Constitution to take military action against Iraq without legislative approval even after Congress adopted the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. See Communication from the President of the United States Transmitting a Report Consistent with Section 3(b) of the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243 reprinted in H.R. Doc. No. 50, 108th Cong., 1st Sess. 10 (2003); see also Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote; Some See Such Support As Politically Helpful*, WASH. POST, Aug. 26, 2002, at A01. See generally John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 794 (2004) (arguing that in the face of “challenges to American national security,” political branches should be allowed “to shape war decisions without any interference from the federal judiciary”).

<sup>8</sup> John Yoo, *A President Can Pull the Trigger*, L.A. TIMES, Dec. 20, 2005, at B15 [hereinafter Yoo, *A President Can Pull the Trigger*]; see also JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter YOO, *POWERS OF WAR AND PEACE*]; YOO, *supra* note 3; Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L. J. 2512, 2514-17 (2006); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004); Yoo, *supra* note 7; John Yoo, *Anti-Terror Weapons We’re Afraid to Use*, L.A. TIMES, Aug. 19, 2006; John Yoo, *Exercising Wartime Powers*, HARV. INT’L REV., Apr. 1, 2006, at 22 [hereinafter Yoo, *Wartime Powers*]; John Yoo, *How We Fight: The President Properly Commands the War on Terror*, LEGAL TIMES, Feb. 5, 2007, at 44; John Yoo, *Wartime, Constitution Empower Presidents*, SAN DIEGO UNION-TRIBUNE, Jan. 15, 2006, available at [http://www.signonsandiego.com/uniontrib/20060115/news\\_lz1e15yoo.html](http://www.signonsandiego.com/uniontrib/20060115/news_lz1e15yoo.html).

<sup>9</sup> Prominent constitutional scholars have expressed concern about presidential warmaking for years. See, e.g., Brief for Bruce A. Ackerman, et al. as Amici Curiae, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866) (John Hart Ely, Erwin N. Griswold, Gerald Gunther, Philip B. Kurland, and Laurence Tribe, among others, requesting the federal court to stop President Bush from engaging troops against Iraq without Congress’s “genuine approval”) reprinted in 27 STAN J. INT’L L. 257 (1991); Alexander Bickel, *The Constitution and the War*, COMMENT., July 1972, at 49 (charging President Lyndon Johnson with starting “an unconstitutional war”). But see Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364 (1994) (book review); Eugene V. Rostow, “Once More unto the Breach”: *The War Powers Resolution Revisited*, 21 VAL. U.L. REV. 1 (1986); Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to “Declare War,”* 25 HARV. J.L. & PUB. POL’Y 521 (2002).

<sup>10</sup> See, e.g., Saikrishna Prakash, *Reply: A Two-Front War*, 93 CORNELL L. REV. 197, 197 (2007) (commending Yoo’s “first-rate scholarship” on “declare war”); David B. Rivkin & Carlos Ramos-Mrosovsky, *Rights and Conflicts*, NAT’L REV., Nov. 21, 2005 (reviewing YOO, *POWERS OF WAR AND PEACE*, *supra* note 8) (“Yoo’s work helps build a constitutionally legitimate foundation for victory.”); David J. Bederman, Book Note, 100 AM. J. INT’L L. 490 (2006) (reviewing YOO, *POWERS OF WAR AND PEACE*, *supra* note 8) (“[M]any, but not all, of Yoo’s constitutional submissions are correct.”);

sure, but no one to this point has made a detailed counterargument assessing the foundations of Yoo's position.<sup>11</sup>

This Essay offers a point-by-point rebuttal of Yoo's interpretation of the Declare War Clause.<sup>12</sup> Yoo bases his interpretation on constitutional text and structure, which, he believes, scholars on both sides of the debate have neglected.<sup>13</sup> He also relies on the original understanding.<sup>14</sup> In Yoo's view, the Declare War Clause was originally understood as a power given Congress to legally recognize a state of war, not to begin one. After surveying related textual provisions, Part I of this Essay examines key points in Yoo's historical reading—Blackstone's *Commentaries*, early state constitutions, records of the framing and ratification of the Constitution—which indicate that “declare war” did not have the restrictive meaning Yoo suggests. Next, Part II analyzes Yoo's specific textual arguments, which consider, among other things, the use of the “levying war” language in the Treason Clause, the phrase “determining on peace and war” in the Articles of Confederation, and the word “declare” in the Declaration of Independence. Turning to Yoo's structural analysis, Part III examines Congress's appropriations power, constitutional processes of decision-making (e.g., treaties, appointments), and the conception of a unitary executive. Finding that none of these presents a structural impediment to Congress's authority to decide on war, the Essay closes by suggesting that a structural inquiry into values implicit in the constitutional framework can yield a convincing rationale for legislative, rather than executive, power to make the decision to go to war.

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Book Note, 119 HARV. L. REV. 1238 (2006) (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8) (noting Yoo's “formidable” analysis).

<sup>11</sup> See, e.g., David Cole, *What Bush Wants to Hear*, N.Y. REV. OF BOOKS, Nov. 17, 2005 (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000); Stephen Holmes, *John Yoo's Tortured Logic*, THE NATION, May 1, 2006, at 31 (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8); Neal Katyal, *Executive Decision: A Key Former Bush Aide Argues for Wartime Presidential Clout*, WASH. POST, Jan. 8, 2006 (Book World), at T07 (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8); Michael Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451-53 (2006) (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8); Gordon Silverstein, *Constitutional Contortion? Making Unfettered War Powers Compatible with Limited Government*, 22 CONST. COMMENT. 349, 350-51 (2005) (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8); Sunstein, *supra* note 2; John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754, 758-64 (2007) (reviewing YOO, POWERS OF WAR AND PEACE, *supra* note 8).

<sup>12</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>13</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 144.

<sup>14</sup> *Id.* at 24.

## I. ORIGINAL UNDERSTANDING

In his major work, *The Powers of War and Peace*,<sup>15</sup> Yoo promises a “close examination of the text” which will yield “important and long-overlooked insights.”<sup>16</sup> Focusing on the Declare War Clause, which states simply that Congress shall have the power to “declare War,”<sup>17</sup> Yoo explores the meaning of the word “declare.” He finds it significant that the Framers of the Constitution used that word instead of others like “make,” “begin,” or “authorize.”<sup>18</sup> He asks what “declare” meant at the founding, and for an answer he cites Samuel Johnson’s dictionary, published in England. It defined “declare” as: “to publish; to proclaim;” “to make known, to tell evidently and openly;” “to shew in open view;” “to clear, to free from obscurity;” and “to make a declaration, to proclaim some resolution or opinion, some favour or opposition.”<sup>19</sup> Based on these definitions, Yoo describes Congress’s power to declare war as a power to recognize “a state of affairs—clarifying the legal status of the nation’s relationship with another country”—rather than a power to authorize “the creation of that state of affairs.”<sup>20</sup>

Yoo makes constitutional interpretation look easy. Input a dictionary definition and output the result. Some constitutional provisions do lend themselves to quick and obvious interpretations based solely on the text. When the Constitution states, for instance, that no one can be president “who shall not have attained to the Age of thirty five Years,”<sup>21</sup> those words have a plain meaning that people understand today as much as they did at the founding. The text is clear on its face, and there is no room for serious debate.

Interpreting the Constitution is not always so simple. With more open-ended language (e.g., “due process of law,”<sup>22</sup> “freedom of speech,”<sup>23</sup> and

<sup>15</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8. Jeffrey Rosen called Yoo’s *Powers of War and Peace* the “most sustained intellectual defense” of the Bush “administration claims about presidential supremacy.” Jeffrey Rosen, *The Yoo Presidency*, N.Y. TIMES, Dec. 11, 2005 (Magazine), at 106.

<sup>16</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 144.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 11. See generally STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 18-19, 26-29, 102-11, 142-43, 178-79 (2005).

<sup>18</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 145.

<sup>19</sup> Samuel Johnson, A Dictionary of the English Language (W. Strahan ed., 1755).

<sup>20</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 145. But see David Gray Adler, *The Constitution and Presidential Warmaking*, 103 POL. SCI. Q. 1, 6 (1988); Cole, *supra* note 11. See also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 103 (2d ed. 1996); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 30, 33 (1991).

<sup>21</sup> U.S. CONST. art. II, § 1, cl. 4.

<sup>22</sup> *Id.* amend. V; *id.* amend. XIV, § 1.

“high Crimes and Misdemeanors”<sup>24</sup>), the Constitution furnishes a framework for interpretation that calls for more than dictionary definitions.<sup>25</sup> So it is with the Declare War Clause.

Yoo faults other scholars for not taking the text of the Constitution seriously. Yet as he lays out his argument focusing on the word “declare,”<sup>26</sup> his readers can easily lose sight of the collection of powers the Constitution grants Congress relating to war and military affairs: to “provide for the common Defence;”<sup>27</sup> to “raise and support Armies” (with no appropriation of money to last longer than two years);<sup>28</sup> to “provide and maintain a Navy;”<sup>29</sup> to “make Rules for the Government and Regulation of the land and naval Forces;”<sup>30</sup> to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;”<sup>31</sup> to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States;”<sup>32</sup> to “grant Letters of Marque and Reprisal” (essentially to license private parties to seize foreign merchant ships);<sup>33</sup> and to “make Rules concerning Captures on Land and Water.”<sup>34</sup> Congress also has a reservoir of implied powers to make all laws “necessary and proper” to execute its enumerated powers and all other powers of the national government and any officer, including the president.<sup>35</sup>

Only one constitutional provision relates specifically to the president’s war powers: the clause designating the president “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>36</sup> The Constitution also states more generally that the executive power “shall be vested” in the President.<sup>37</sup>

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<sup>23</sup> *Id.* amend. I.

<sup>24</sup> *Id.* art. II, § 4.

<sup>25</sup> See generally Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 3-119 (1982).

<sup>26</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 144-52.

<sup>27</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>28</sup> *Id.* art. I, § 8, cl. 12.

<sup>29</sup> *Id.* art. I, § 8, cl. 13.

<sup>30</sup> *Id.* art. I, § 8, cl. 14.

<sup>31</sup> *Id.* art. I, § 8, cl. 15.

<sup>32</sup> *Id.* art. I, § 8, cl. 16.

<sup>33</sup> *Id.* art. I, § 8, cl. 11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* art. I, § 8, cl. 18; see Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 139-40 (1971).

<sup>36</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>37</sup> *Id.* art. II, § 1, cl. 1. See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-54, 256-61 (2001); Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL’Y 141 (2006); John

Yoo scatters references to several of these provisions,<sup>38</sup> but he is willing to rest his argument on the Declare War Clause.<sup>39</sup> Given the assortment of powers Congress has over the use of military force, Yoo puts a lot of pressure on one word—“declare”—to justify the president’s right to start wars without involving Congress. Suppose we accept Yoo’s approach for the moment. Consider the Declare War Clause by itself. Take “declare” as defined in Johnson’s dictionary, say, “to make known” or to “proclaim.”<sup>40</sup> All we know to this point is that Congress has the power to make known that we are at war. It is a jump from there to conclude that this constitutional language denies Congress authority to decide on war. And it is a still greater leap in logic to conclude that the phrase “declare war” itself entrusts the decision solely to the president.

Yoo’s case might be strengthened if he could cite at least one of the Constitution’s framers—or anyone from the founding period for that matter—who actually used Samuel Johnson’s definition of “declare” to interpret the Declare War Clause. He is unable to do that.

James Madison had proposed the language “declare war” at the Constitutional Convention in 1787.<sup>41</sup> It was his view, as he said a few years later, that those who “conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded.”<sup>42</sup> He never deviated from his understanding that “the constitution supposes, what the History of all Govts. demonstrates,” that the executive is “the branch of power most interested in war, & most prone to it.” The Constitution, he told Thomas Jefferson in 1798, had “accordingly with studied care, vested the question of war in the Legisl.”<sup>43</sup> Even though Madison suggested that the Constitution include the phrase

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Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 196-217 (1996).

<sup>38</sup> See, e.g., YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 18-19, 147-48; John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1175-76 (1999) [hereinafter Yoo, *Clio*].

<sup>39</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 144-52; Yoo, *Wartime Powers*, *supra* note 8.

<sup>40</sup> See JOHNSON, *supra* note 19.

<sup>41</sup> 2 The Records of the Federal Convention of 1787, at 318 (Max Farrand ed., rev. ed. 1937) [hereinafter *Convention Records*].

<sup>42</sup> James Madison, *Helvidius No. I*, reprinted in *Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793*, at 61 (1845) (emphasis added).

<sup>43</sup> Letter from James Madison to Thomas Jefferson (Apr. 2, 1797), in JAMES MADISON: WRITINGS 586 (Jack Rakove, ed. 1999); but see Yoo, *Clio*, *supra* note 38, at 1183.

“declare war,” Yoo does not put much stock in his constitutional views on warmaking.<sup>44</sup>

There were several other leading founders who commented specifically on Congress’s power to declare war and construed its meaning differently than Yoo does. One was James Wilson, among the most important delegates at the Constitutional Convention. “This system will not hurry us into war,” he said in the ratification debates. “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.”<sup>45</sup>

Yoo thinks Wilson “may” have meant that treaties (made by the president with the Senate’s consent) could not draw the nation into “full-scale war;” only the whole Congress could do that.<sup>46</sup> Even if true, that does not negate the evidence that Wilson’s comment provides on how “declare war” was understood. He suggested that, with Congress empowered to declare war, only the legislature and not a “single man” (in other words, not the president) could “involve” the nation in war.<sup>47</sup> Evidently sensing a problem, Yoo concedes Wilson “was a leading Federalist who relied on the Declare War Clause as a limitation on the war power.” Yet “the history will show,” Yoo insists, “he was the only one” to do so.<sup>48</sup>

With such a categorical assertion, Yoo’s readers might be surprised with a statement made by George Washington, who presided over the Constitutional Convention. “The constitution vests the power of declaring war with Congress,” Washington said early in his second administration; “therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure.”<sup>49</sup> Or consider the views of Alexander Hamilton, co-author of *The Federalist*. He emerged as the leading advocate of a strong executive in foreign affairs, and, during Jefferson’s administration, he argued that the president did not need a congressional declaration of war to *respond* when

<sup>44</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 4, 27, 28; Yoo, *Clio*, *supra* note 38, at 1182.

<sup>45</sup> 2 The Debates in the Several State Convention on the Adoption of the Federal Constitution 528 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1836) [hereinafter *Debates*].

<sup>46</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 120; *see also* Yoo, *Clio*, *supra* note 38, at 1184-85.

<sup>47</sup> 2 DEBATES, *supra* note 45, at 528.

<sup>48</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 121. *But see* Holmes, *supra* note 11.

<sup>49</sup> Letter from George Washington to William Moultrie (Aug. 28, 1793), in 10 The Writings of George Washington 367 (Jared Sparks ed., 1836); *but see* Robert Delahunty & John Yoo, *Response: Making War*, 93 CORNELL L. REV. 123, 158-62 (2007).

Tripoli made war on the United States. The case was different, in Hamilton's view, "when the nation is at peace."<sup>50</sup> He explained: the Constitution "provided affirmatively, that, 'The Congress shall have power to declare war'; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war, . . . in other words, it belongs to Congress only, *to go to war*."<sup>51</sup>

These founders' statements are significant. They do not simply articulate a general view of Congress's war powers. Each directly addresses the question of what "declare war" meant. None restricts its meaning to Samuel Johnson's dictionary definitions.

Although Yoo peppers his arguments with references to the Constitution's framers and what "the Framers thought,"<sup>52</sup> he minimizes what they actually said when adopting the Declare War Clause.<sup>53</sup> The specific discussion of Madison's "declare war" proposal at the Constitutional Convention (recounted below) does not clarify the Framers' views, Yoo contends.<sup>54</sup> Even if the convention's records established the delegates' views on this subject beyond any doubt, the focus, Yoo argues, should be on what those who ratified the Constitution believed the Declare War Clause meant.<sup>55</sup> As little was said about this provision during the ratification debates,<sup>56</sup> Yoo feels free to "reconstruct" (his word) the original understanding of Congress's power over war<sup>57</sup> in order to place "the Constitution's textual allocation" of foreign affairs powers in its proper "legal and political context."<sup>58</sup> Yoo bases his reconstruction on Anglo-American constitutional history of the eighteenth century, a history

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<sup>50</sup> Alexander Hamilton, Examination of Jefferson's Message to Congress of December 7, 1801, in 8 THE WORKS OF ALEXANDER HAMILTON 249 (Henry Cabot Lodge ed., 1971) (1904) (emphasis omitted).

<sup>51</sup> *Id.* (emphasis in original). See also Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law 23-25 (1986).

<sup>52</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 148.

<sup>53</sup> *Id.* at 27.

<sup>54</sup> *Id.* at 98.

<sup>55</sup> *Id.* at 28, 107.

<sup>56</sup> See W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 85 (1981). Pamphlets written during the ratification process do evince concern about the national government's military power under the Constitution; in particular, that having the executive in charge of a standing army was a prescription for tyranny. See, e.g., Brutus X, N.Y. J. (Jan. 24, 1787), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 379-86 (Merrill Jensen ed., 1976).

<sup>57</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 28.

<sup>58</sup> *Id.* at 30.



in which he finds the executive—beginning with the monarchy in England—in charge of initiating and conducting wars.<sup>59</sup>

Of course, it is one thing to put forward a general proposition that the Constitution’s framers operated within the Anglo-American political tradition. It is quite another to conclude that particular powers exercised by the king, like the power to decide on war, were granted to the president because they were with the Crown. After all, the American Constitution expressly allocated several of the monarchy’s war powers to Congress, including the power to declare war.<sup>60</sup> The question, then, is whether Yoo’s reconstruction of such a wide-ranging history demonstrated what Americans at the founding understood declaring war to mean. To be precise, does his historical rendition show that, by placing the power to declare war in Congress, the founding generation understood that the president, like the king of England, was in charge of deciding whether to go to war?

In answer to that question, Yoo presents historical evidence on a number of points. A few of the most important will be addressed here. One major point for Yoo concerns the classification of war powers as legislative or executive. He claims that the Constitution’s framers, drawing on British constitutional thought, classified war powers as executive. Yoo backs up this claim by pointing particularly to the writings of Sir William Blackstone.<sup>61</sup> The founding generation, Yoo says, “looked for guidance” to the English jurist, whose *Commentaries on the Laws of England* established that “the conduct of foreign affairs” was “purely executive in nature.”<sup>62</sup>

Although the *Commentaries* were influential in America, even a cursory glance at Blackstone’s wording raises questions about the relevance of his statements on warmaking to the new republic: “the king has also the sole prerogative of making war and peace,” and it “would indeed be extremely improper that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.”<sup>63</sup> Blackstone’s relevance is diminished further by statements made at the Philadelphia Convention. After Charles Pinckney and John Rutledge made passing references to war powers as executive,<sup>64</sup> James Wilson said he

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<sup>59</sup> *Id.* at 32.

<sup>60</sup> See Holmes, *supra* note 11.

<sup>61</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 32.

<sup>62</sup> *Id.* at 32, 40.

<sup>63</sup> William Blackstone, 1 *Commentaries* \*252.

<sup>64</sup> 1 CONVENTION RECORDS, *supra* note 41, at 64-65.

“did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature,” including those “of war & peace.”<sup>65</sup> Madison agreed with Wilson: “executive powers *ex vi termini* [by the force of the term], do not include the Rights of war & peace.”<sup>66</sup> As for Blackstone’s specific discussion on declarations of war, Yoo’s reading of the *Commentaries* is at least open to question. Emphasizing Blackstone’s point that declarations make war “completely effectual,” Yoo interprets the *Commentaries* to mean that the king “could issue a declaration of war either before or after “the actual commencement of hostilities.”<sup>67</sup> Whether or not this reading of Blackstone is justified, the question is how America’s founding generation understood Blackstone on this point. Americans familiar with Blackstone could have read the relevant passage from the *Commentaries* differently, concluding that military hostilities should not begin before a declaration of war was issued. For Blackstone specifically stated that, “according to the law of nations,” a declaration of war “ought always to precede the actual commencement of hostilities.”<sup>68</sup>

Turning to the American experience before the Constitution was adopted, Yoo points particularly to the state constitutions adopted during the Revolution, which he argues maintained the British “allocation of warmaking powers,” with state governors having broad authority to start wars without legislative interference.<sup>69</sup> Yoo’s description of Virginia’s constitution stands out in his historical analysis. He makes much of what happened to Thomas Jefferson’s proposal. As Yoo recounts the episode, Jefferson would have denied the executive the authority to declare war, but Virginia’s delegates “put aside his suggestions” and adopted George Mason’s proposal instead.<sup>70</sup> Mason’s draft empowered the governor to embody the militia with the approval of the state’s privy council.

If readers search Yoo’s footnotes, they can discover a significant passage in the constitution Virginia adopted,<sup>71</sup> which prohibited the

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<sup>65</sup> *Id.* at 65-66.

<sup>66</sup> *Id.* at 70; see also Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679 (1972) (stating that resolutions “sent to the Committee on Detail” did not “contain the general proposition that the executive should enjoy the executive powers vested in the Confederation Congress”). Cf. YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 92 (“At this point in the debate, the Framers seemed to agree that vesting the president with all the ‘executive powers’ of the Articles of Confederation would include the power over war and peace.”).

<sup>67</sup> Yoo, Powers of War and Peace, *supra* note 8, at 42.

<sup>68</sup> See BLACKSTONE, 1 COMMENTARIES \*249-50.

<sup>69</sup> Yoo, Powers of War and Peace, *supra* note 8, at 65.

<sup>70</sup> *Id.* at 64.

<sup>71</sup> See *id.* at 318 n.30.

governor, “under any presence,” from exercising “any power or prerogative, by virtue of any law, statute, or custom of England.”<sup>72</sup> As the king had the “sole prerogative” to make war under English law (as Blackstone had said),<sup>73</sup> the Virginia constitution did not permit the governor to derive that warmaking power from English practices. When Yoo says the Virginians “put aside” Jefferson’s suggestions,<sup>74</sup> he omits a significant fact. Jefferson’s draft came too late in the process, after a committee had already approved Mason’s proposed constitution.<sup>75</sup> Yoo subtly leaves the impression that Mason, of all people, opposed Jefferson’s effort to deny the executive the power to declare war. The irony here quickly reveals itself: as a delegate to the Philadelphia Convention framing the federal Constitution, Mason actively supported Madison’s proposal to give Congress the power to declare war after expressing his view that the executive “was not (safely) to be trusted” with the power of war.<sup>76</sup>

Looking beyond Virginia, Yoo informs us that “[m]ost states rejected Jefferson’s approach.” Apparently unable to cite any direct evidence of states explicitly considering and then rejecting the specific proposal Jefferson advanced concerning declaring war, Yoo’s argument rests on two points: first, Jefferson’s plan (the entire plan) was “widely circulated,” and second, states failed to adopt it. Yoo concludes that “state silence” on the subject “suggests an acceptance of the British approach.”<sup>77</sup> Several states adopted provisions similar to Mason’s proposal for the Virginia constitution that authorized the governor to embody the militia with the privy council’s approval.<sup>78</sup> According to Yoo, this language shows that governors had “no preexisting duty to consult with the legislature before sending” their states into war.<sup>79</sup> Securing the council’s approval is more significant than Yoo allows. Although he considers the privy council “part of the executive branch,” council members were elected by legislative assemblies or the people.<sup>80</sup> As Gordon S. Wood explained, councilors were not “mere creatures and aides of the magistracy” like the British monarch’s Privy Council; instead, they were “more controllers than

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<sup>72</sup> VA. CONST. ¶9 (1776).

<sup>73</sup> See Blackstone, 1 Commentaries \*252.

<sup>74</sup> Yoo, Powers of War and Peace, *supra* note 8, at 64.

<sup>75</sup> See Dumas Malone, Jefferson the Virginian 236 (1948).

<sup>76</sup> See 2 CONVENTION RECORDS, *supra* note 41, at 319.

<sup>77</sup> *Id.* at 64, 65.

<sup>78</sup> See, e.g., MD. CONST. art. XXXIII (1776); DEL. CONST. art. IX (1776); N.C. CONST. art. XVIII (1776).

<sup>79</sup> Yoo, Powers of War and Peace, *supra* note 8, at 66.

<sup>80</sup> *Id.* at 64.

servants of the governors in the business of ruling.”<sup>81</sup> Yoo overlooks a basic point: there was more than one way to limit the power of a single executive to decide on war, and these state charters ensured that the decision to call forth the militia was not left in the hands of one person.

Yoo singles out Massachusetts’s 1780 constitution, part of a second wave of constitution-making, as proof of the “shared understanding” that governors “enjoyed traditional executive warmaking powers” with “executive initiative” to “make war.”<sup>82</sup> The evidence is less clear than Yoo suggests. He says the Massachusetts constitution did not limit the governor to “defensive responses to attack” but “explicitly” provided for “offensive operations” under the governor’s “direct authority.”<sup>83</sup> Yet the constitution framed the governor’s military actions around a limited purpose—“the special defence” of the state.<sup>84</sup> Comparing the constitution Massachusetts adopted with one it rejected, Yoo finds the example of Massachusetts “particularly compelling because it responded to a proposal that the legislature approve all military operations.”<sup>85</sup> He notes that the rejected constitution would have authorized the governor to exercise military power only “according to the laws” or “resolves” of the legislature.<sup>86</sup> Yoo neglects to mention that the constitution adopted by Massachusetts did require the governor to exercise his military powers “agreeably” to the “laws of the land.”<sup>87</sup> Yoo points out that the rejected constitution would have required senate approval for the governor to take the militia out of state.<sup>88</sup> Note that the adopted constitution also required the governor to secure the consent of others to do that, from either the legislature or the militia.<sup>89</sup> Yoo cites a document called the Essex Result which shaped the debate over the Massachusetts constitution. He says the Essex Result promoted “a system in which the executive first took action in war, and then sought approval after the fact from the legislature and the people.”<sup>90</sup> Yoo does not disclose what may be the most important point the Essex Result makes relating to war powers. Massachusetts, according to the Essex Result, had nothing to do with “external executive” powers concerning “war, peace.” That was for the Confederation Congress. The

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<sup>81</sup> Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 139 (1969).

<sup>82</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 69.

<sup>83</sup> *Id.*

<sup>84</sup> MASS. CONST. pt. 2, ch. I, § I, art. VII (1780).

<sup>85</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 71.

<sup>86</sup> *Id.* at 69.

<sup>87</sup> MASS. CONST. pt. 2, ch. II, § I, art. VII (1780).

<sup>88</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 69.

<sup>89</sup> MASS. CONST. pt. 2, ch. II, § I, art. VII (1780).

<sup>90</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 71.

state's executive power was limited to the "internal executive power" to "marshal and command" troops "in the defence of the state."<sup>91</sup>

If Yoo is willing to derive the original understanding of the Declare War Clause from such things as the "silence"<sup>92</sup> of state constitutions and the definition he found in an eighteenth-century dictionary published in England, then surely the Framers' discussion at the Philadelphia Convention of the exact words in question—"declare war"—has some bearing on how the founding generation understood those words.

The Framers adopted the Declare War Clause when considering a proposal from their Committee on Detail that empowered Congress to "make war."<sup>93</sup> The critical point in the debate came when Madison, joined by Elbridge Gerry, moved to substitute "declare war" for "make war," while "leaving to the Executive the power to repel sudden attacks."<sup>94</sup> That statement suggests that they understood their proposal of "declare war" to require congressional action before going to war, except in the case of sudden attacks when there was no time.<sup>95</sup> If they believed the executive could start wars at will, there was no need to make a special point about the executive's power to repel attacks.

Yoo cannot afford to let that stand, so he speculates. He argues that neither Madison nor Gerry said anything at the convention about the executive repelling sudden attacks. Yoo contends that Madison inserted that statement later in his notes.<sup>96</sup> That is a neat way to call into question the authenticity of problematic statements in the Framers' debates, as the Convention's records themselves draw extensively on Madison's notes.<sup>97</sup> If that approach to the records may be justified elsewhere, it will not work here.

The statement about repelling sudden attacks fits into the flow of the whole debate. Before the Madison/Gerry motion, Charles Pinckney had questioned whether the Congress should have the power to "make war" because "its proceedings were too slow" (he recommended giving the Senate that power).<sup>98</sup> The solution to the problem Pinckney identified lies at the heart of the Madison/Gerry statement: the executive could respond

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<sup>91</sup> The Essex Result, 1778, *reprinted in* The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780, at 337 (Oscar Handlin & Mary Handlin eds., 1966).

<sup>92</sup> Yoo, Powers of War and Peace, *supra* note 8, at 65.

<sup>93</sup> 2 CONVENTION RECORDS, *supra* note 41, at 318.

<sup>94</sup> *Id.*

<sup>95</sup> See Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 43-44 (1972).

<sup>96</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 97.

<sup>97</sup> See 1 CONVENTION RECORDS, *supra* note 41, at vii.

<sup>98</sup> 2 *id.* at 318.

quickly to a sudden attack without waiting for Congress. Immediately following the “declare war” proposal, Roger Sherman said the executive should be able “to repel.”<sup>99</sup> That certainly looks like a direct response to the comment by Madison that Yoo alleges was never made.

Yoo thinks the ensuing discussion shows “quite clearly” that there was no “clear consensus on the Declare War Clause,”<sup>100</sup> and he does his best to make the debate appear confusing. Yet the delegates came to a nearly unanimous decision approving the “declare war” language. The explanation offered by Rufus King, the last to speak, was important; it may have been decisive. He said granting Congress the power to make war “might be understood to ‘conduct’ it[,] which was an Executive function.”<sup>101</sup> In the Convention’s official journal, the delegates initially rejected the “declare war” proposal by a vote of five states to four.<sup>102</sup> After King’s comment, a second vote was taken with eight states in favor and only New Hampshire opposed. According to the version taken from Madison’s notes, the first vote was seven to two in favor of the “declare war” language and only Connecticut changed its position after King spoke.<sup>103</sup>

The discussion in between the Madison/Gerry motion and King’s remark established a few basic points that provide further evidence of how the Framers understood the “declare war” language. To begin with, delegates expressed concern about getting into wars. George Mason said he was “for clogging rather than facilitating war” and “for facilitating peace.”<sup>104</sup> It should be “more easy to get out of war, than into it,” noted Oliver Ellsworth.<sup>105</sup> The question was how to structure the Constitution—the powers of the legislative and executive branches—to do that. Mason said “the executive was not (safely) to be trusted” with “the power of war.”<sup>106</sup> There was no sign of disagreement about that position after the Madison/Gerry motion.<sup>107</sup> If there was an underlying theme to the discussion, it was of republicanism—at its most basic level the idea of citizens governing themselves—and how executive power combined with the military threatened the vitality of republics. This was a lesson the

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<sup>99</sup> *Id.*

<sup>100</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 98.

<sup>101</sup> 2 CONVENTION RECORDS, *supra* note 41, at 319.

<sup>102</sup> *Id.* at 313.

<sup>103</sup> *Id.* at 313, 319.

<sup>104</sup> *Id.* at 319.

<sup>105</sup> *Id.* Ellsworth was later appointed chief justice of the Supreme Court.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 318-19.

Framers drew from history, with the end of the Roman Republic at the hands of Julius Caesar providing one notable example. Today's readers of the convention's proceedings can still sense Elbridge Gerry's indignation when he told delegates he "never expected to hear in a republic a motion to empower the Executive alone to declare war."<sup>108</sup>

After the Madison/Gerry motion, no delegate said anything comparable to Yoo's position. Roger Sherman said the opposite: the executive should not be able "to commence war." At first, Sherman thought Congress should have the power to "make war" instead of "declare war," with "the latter narrowing the power too much."<sup>109</sup> Yoo interprets Sherman to mean the Madison/Gerry proposal would "permit the president to initiate hostilities."<sup>110</sup> It is difficult to read the entire debate and take the next step Yoo wants us to take, that the delegates approved the "declare war" language to enable the president to do that. Sherman, it should be noted, made this point before King explained that "make war" might be construed as conducting war.<sup>111</sup> After Sherman spoke, Mason, whose misgivings about executive war power were perhaps unequaled, stated his preference for "declare" over "make."<sup>112</sup> Sherman did not express further concern, and his state of Connecticut voted to adopt "declare war" in the end.<sup>113</sup>

If there was a large contingent of delegates who interpreted "declare war" to give the president the power to decide on war, they remained silent. Pierce Butler was the only one to say something in favor of giving the president the power to decide on war. He recommended putting the power to make war "in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."<sup>114</sup> As that was before the Madison/Gerry motion, Butler was not interpreting the legislative power to declare war. No one backed Butler's suggestion, and he took a different view of the president three weeks later. When Madison moved to exclude presidents from the treaty-making process (reasoning that they derive so much power in wartime, they might block efforts to make peace),<sup>115</sup> Butler was "strenuous for the motion, as a necessary security against ambitious & corrupt Presidents."<sup>116</sup>

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<sup>108</sup> *Id.* at 318.

<sup>109</sup> *Id.*

<sup>110</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 98.

<sup>111</sup> 2 CONVENTION RECORDS, *supra* note 41, at 318-19.

<sup>112</sup> *Id.* at 319.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 318.

<sup>115</sup> *Id.* at 540.

<sup>116</sup> *Id.* at 541.

Given the tenor of the Framers' discussion, it is no wonder Yoo warns readers against paying attention to what they said. His effort to align his views with original understanding plunges him into difficulties. He wants to show us what "the Framers thought"<sup>117</sup> about the Declare War Clause. Yet he brushes aside the views of the delegate responsible for introducing the phrase "declare war" into our system of government. Yoo considers the discussion of this language at the Constitutional Convention irrelevant. He prefers to look instead at the ratification process, even though hardly anyone discussed declaring war then. When confronted with specific statements from the ratification debates that contradict his interpretation, Yoo dismisses them (he considers Wilson's comment unrepresentative, for instance). Yoo's argumentative strategy, in short, is to draw inferences from the text and historical context for evidence of what the founders must have believed the Declare War Clause meant, even if that contradicts their actual statements about what they understood it to mean.

## II. YOO'S TEXTUAL ARGUMENTS

Yoo's textual arguments are perceived to be among his best, and Cass Sunstein has conceded that they raise "legitimate doubts" that "a declaration is a legal pre-condition for war."<sup>118</sup> One of Yoo's favorite techniques is to compare the Declare War Clause with other constitutional provisions. The Constitution defines treason to include "levying War" against the United States;<sup>119</sup> it also provides that no state shall "engage in War" without Congress's consent.<sup>120</sup> Turning again to eighteenth-century English dictionaries, Yoo cites definitions of "levy" ("to raise, to bring together men") and "engage" ("to embark in an affair" or "to conflict; to fight").<sup>121</sup> From this, he concludes that the Framers would have granted Congress the power to "levy" or "engage" in war if they had wanted to put that body in charge of starting wars.<sup>122</sup> Yoo goes on to suggest that, if declaring war was "as serious as some believe," the Framers would have defined treason as declaring war against the United States and the

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<sup>117</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 148.

<sup>118</sup> Sunstein, *supra* note 2, at 25. See also Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

<sup>119</sup> U.S. CONST. art. III, § 3, cl. 1.

<sup>120</sup> *Id.* art. I, § 10, cl. 3.

<sup>121</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 149.

<sup>122</sup> *Id.* at 145; see also Delahunty & Yoo, *supra* note 49, at 125-28.



Constitution would have said that no state shall declare war without Congress's consent.<sup>123</sup>

This argument has problems at every step. Yoo believes that granting Congress authority to "engage" in war would have been a "much clearer, direct method" to provide lawmakers with "the power to control the actual conduct of war."<sup>124</sup> That is not what the Framers sought to do, however. They wanted the executive in charge of conducting wars, as Rufus King explained.<sup>125</sup> Giving Congress power to "engage" in war would have made that unclear.

In Yoo's view, empowering Congress to levy war would have made "far clearer" Congress's sole power to start wars.<sup>126</sup> Actually, that would have created new interpretive difficulties. Should a congressional power to levy war be construed broadly? If so, it could encroach upon executive authority to conduct military operations as much as the word "engage." Perhaps a more restrictive interpretation is in order, then, reading "to levy war" as nothing more than raising troops. Putting aside the redundancy with Congress's power "to raise" armies,<sup>127</sup> this interpretation hardly confirms Congress's authority to decide on war. So far as the language goes, the power to raise troops relates less to deciding on war than declaring war does. The act of raising troops can take place without any decision on going to war (to deter enemies, for example) or after a decision has been made.

Turning to the Treason Clause, Yoo suggests that if declaring war meant starting hostilities, then the Constitution should have "defined treason to occur when a citizen 'declares war' against the United States."<sup>128</sup> It is odd to think of treason that way, but not for the reason Yoo thinks. He believes the Framers did not define treason as declaring war because they did not consider declaring war a "serious" matter.<sup>129</sup> History offers another explanation. The Framers were following the well-established definition of treason in Anglo-American law. An English statute enacted during the reign of King Edward III in the fourteenth century defined treason as levying war.<sup>130</sup> So did laws in the American

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<sup>123</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 146; *but see* Michael Ramsey, *The Framers' War-Making Powers*, 28 HARV. INT'L REV. 4 (2006).

<sup>124</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 145.

<sup>125</sup> *See* 2 CONVENTION RECORDS, *supra* note 41, at 319; *see also* Cole, *supra* note 11.

<sup>126</sup> *See* YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 145.

<sup>127</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>128</sup> Yoo, Powers of War and Peace, *supra* note 8, at 146.

<sup>129</sup> *Id.*

<sup>130</sup> Treason Act, 25 Edw. 3, stat. 5, c. 2 (1350).

colonies.<sup>131</sup> At the Constitutional Convention, the delegates specifically referred to the English statute when they discussed treason.<sup>132</sup> And while treason was an established criminal offense that persons could commit, declaring war was considered the act of the sovereign, whether king or nation-state.

That leaves Yoo's reference to the Constitution's provision that no "State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."<sup>133</sup> According to Yoo, if the Framers understood declaring war to mean initiating hostilities, and if they were consistent when drafting these constitutional provisions, they would have used "declare" instead of "engage" here.<sup>134</sup>

The Framers, however, had good reason to avoid referring in the Constitution to the states declaring war, even if they understood declaring war to mean starting hostilities. In circumstances of self-defense (as when a state was actually invaded), the Framers considered a declaration of war unnecessary—"nugatory" in Hamilton's words.<sup>135</sup> And, for all Yoo's talk of historical context,<sup>136</sup> he overlooks the situation the Framers confronted in 1787. By then, the need for a stronger central government was clear to many. The Congress operating under the Articles of Confederation was notoriously weak. The states acted as separate sovereign nations (nine claimed their own navies, for instance). One of the Framers' chief concerns was to establish national authority over foreign relations. Against that background, it would have been strange for the Framers to recognize expressly an authority in the states to declare war against other nations.

Yoo raises another question based on this constitutional provision: why did the Framers not say the same of the president? In other words, the Constitution could have stipulated that "the President may not, without the consent of Congress, engage in War, unless the United States are actually invaded, or in such imminent Danger as will not admit of delay?"<sup>137</sup> In Yoo's view, the Framers' failure to use this language "requires us to

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<sup>131</sup> See, e.g., 1702 Conn. Pub. Acts; 1638 Md. Laws.

<sup>132</sup> See 2 CONVENTION RECORDS, *supra* note 41, at 345.

<sup>133</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>134</sup> Yoo, Powers of War and Peace, *supra* note 8, at 147.

<sup>135</sup> Hamilton, *supra* note 50, at 250.

<sup>136</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 24-29; Yoo, *Clio*, *supra* note 38, at 1169-75.

<sup>137</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 147.

believe” they “did not know how to express themselves in one part of the Constitution but did in another part” on “exactly the same subject.”<sup>138</sup>

The unspoken assumption behind this argument is that the Framers shared Yoo’s narrow view of the Declare War Clause. Yet their statements, discussed in Part I, indicate that they had a broader interpretation in mind and they would not have perceived any need for this suggested alternative.<sup>139</sup> At any rate, the language Yoo proposes does not constrain executive power to go to war as much as he suggests. If the Constitution stated no president shall engage in war without Congress’s consent, that would have introduced a subtle but potentially significant shift in power in favor of the executive. Consent can be express or implied, and the actions that will be taken to reflect implied consent are a matter of interpretation. With such a provision, it is not hard to conceive of arguments allowing presidents to take the country to war based on the legislature’s implied consent.

As with all of these comparisons (the Treason Clause, states engaging in war), Yoo draws conclusions from the constitutional language as if the Framers had actually considered the alternatives Yoo presents.<sup>140</sup> Yet there is no record of anyone mentioning any of these alternatives at the Philadelphia Convention. It is one thing for a scholar to develop all sorts of textual possibilities today, but it is important to keep in mind what the convention proceedings were like. In the midst of several months of debate, with substantial differences of opinion over the basic plan of government, the Framers in a brief discussion considered the specific question whether to substitute “declare war” for “make war.” They quickly moved on with the press of business. Yoo himself describes their last-minute discussion as taking place at the “equivalent of 5 p.m. on a Friday.”<sup>141</sup> With that perspective, it is difficult to accept his unqualified conclusion that the Framers “naturally should have written” a provision prohibiting the president from engaging in war without Congress’s consent.<sup>142</sup>

Yoo’s next major argument is based on what he calls “foundational documents.”<sup>143</sup> He asks why the Constitution’s framers did not copy Article IX from the Articles of Confederation, which granted the

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<sup>138</sup> *Id.* at 146.

<sup>139</sup> See *supra* notes 42-51, 93-116 and accompanying text.

<sup>140</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 147.

<sup>141</sup> See *id.* at 97.

<sup>142</sup> *Id.* at 147.

<sup>143</sup> *Id.* at 148.

Confederation Congress the “sole and exclusive right and power of determining on peace and war.”<sup>144</sup> The Framers were “clumsy draftsmen indeed,” Yoo notes, if they meant to give the new Congress power to begin military hostilities but failed to use this language.<sup>145</sup> He says the Framers “changed Congress’s power to ‘declare war’ from ‘determining on peace and war.’”<sup>146</sup>

This argument might carry more weight if the “sole and exclusive” language of the Articles of Confederation had divided power between legislative and executive branches. That is not what it did. There was no separate executive in the Confederation. Congress then exercised both executive and legislative powers.<sup>147</sup> The purpose of Article IX’s “sole and exclusive” language was to mark the dividing line in the powers belonging to the Confederation government and the individual states.

Interestingly, the Articles of Confederation also referred to Congress issuing a “declaration of war.”<sup>148</sup> Yoo assumes without offering any evidence that this was understood to be different from determining on war.<sup>149</sup> He does not cite anyone from the founding period who made such a distinction. Indeed, at New York’s ratification convention, Robert R. Livingston pronounced the new Congress’s powers (including war) the “very same” as those exercised by the old Congress under the Articles.<sup>150</sup> Yoo, who frequently counsels readers to pay close attention to “what those who ratified the Constitution believed the text meant,”<sup>151</sup> downplays this remark. It reflects a “misunderstanding,” Yoo insists; Livingston really meant to compare the new federal government as a whole with the Confederation government.<sup>152</sup> Possibly, but then did Madison also misunderstand when he said the Articles of Confederation established Congress’s “power of declaring war” in “the most ample form?”<sup>153</sup> Or

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<sup>144</sup> U.S. Arts. of Confederation art. IX.

<sup>145</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 148.

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress 1774-1789* (1979).

<sup>148</sup> U.S. ARTS. OF CONFEDERATION art. VI. Yoo says that “the word ‘declare’ does not appear at all in the Articles of Confederation in connection with war.” Delahunty & Yoo, *supra* note 49, at 134. Yoo does not inform his readers that Article VI provided that “nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled.” U.S. ARTS. OF CONFEDERATION art. VI.

<sup>149</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 148.

<sup>150</sup> 2 DEBATES, *supra* note 45, at 278; see also Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 86 (2007).

<sup>151</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 28.

<sup>152</sup> Yoo, *supra* note 37, at 282 n.532.

<sup>153</sup> THE FEDERALIST NO. 41 (James Madison).

John Jay, one of his *Federalist* co-authors, who at New York's ratification convention seemed to treat declaring war as equivalent to deciding and engaging in war?<sup>154</sup>

When Yoo says the Framers “changed” Congress's power (from determining war to declaring it),<sup>155</sup> he conveys the impression that the delegates at the Constitutional Convention explicitly considered and rejected this language from the Articles of Confederation in order to grant the president, rather than the new Congress, the power to decide on going to war. Yet when the Framers debated Madison's “declare war” proposal, no one referred to the Articles of Confederation.<sup>156</sup> Moreover, judging from the sentiment expressed earlier in the Convention, the Framers opposed placing the Confederation Congress's powers of “determining” on war in the new executive created by the Constitution. At the start of the convention, Edmund Randolph proposed in the Virginia Plan that “a National Executive” have “the Executive rights vested in Congress by the Confederation.”<sup>157</sup> In response, Charles Pinckney of South Carolina said that he was “afraid” of giving the executive under the Constitution “the Executive powers” of the Confederation Congress over war and peace.<sup>158</sup> That would make the “Executive a Monarchy, of the worst kind,” Pinckney said.<sup>159</sup> John Rutledge concurred: “he was not for giving” the new executive “the power of war and peace.”<sup>160</sup> James Wilson then offered a more limited interpretation of executive powers that addressed these concerns, suggesting that the powers of war and peace were not executive in nature.<sup>161</sup> Madison registered his agreement with Wilson's interpretation.<sup>162</sup> Against that background, Randolph and Wilson drafted constitutions which located the power “to make war” in the legislature. The Committee on Detail did likewise in the constitution it submitted for the delegates' consideration.<sup>163</sup>

After the Articles of Confederation, Yoo considers the state constitutions the “next most important founding-era documents,”<sup>164</sup> fueling

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<sup>154</sup> 2 DEBATES, *supra* note 45, at 284.

<sup>155</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 12, at 148.

<sup>156</sup> 2 CONVENTION RECORDS, *supra* note 41, at 318-19.

<sup>157</sup> 1 *id.* at 21.

<sup>158</sup> 1 *id.* at 64.

<sup>159</sup> 1 *id.* at 65.

<sup>160</sup> *Id.*

<sup>161</sup> 1 *id.* at 65-66.

<sup>162</sup> 1 *id.* at 70.

<sup>163</sup> 2 *id.* at 143; Lofgren, *supra* note 66, at 679. See also Prakash & Ramsey, *supra* note 37, at 279-87.

<sup>164</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 148.

an expectation that several support his position. He produces only one to support his textual argument, that of South Carolina, not usually considered a model charter for the Framers. South Carolina had two constitutions. The first, adopted in 1776, said the president (of the state) “shall have no power to make war or peace . . . without the consent” of the legislature.<sup>165</sup> Under the second (from 1778), the governor had “no power to commence war” without legislative approval.<sup>166</sup>

Yoo claims these constitutions “show that the Framers did not understand the phrase ‘declare war’ to amount to the power to ‘make war’ or to ‘commence war.’”<sup>167</sup> It is a bold assertion—with all the Framers had going on—that the mere existence of one state’s two constitutions can “show” what the delegates thought at any given moment. Does Yoo offer evidence that the Framers specifically considered the language of the South Carolina constitutions before adopting the Declare War Clause? No. Do the records of the convention indicate that any delegates mentioned them in their discussion of “declare war”? No. How many of the Framers had read South Carolina’s constitutions? Yoo does not say. Even assuming every delegate had read every state constitution at some point, how many delegates had these provisions in mind when considering the Madison/Gerry motion? Yoo has no evidence to answer that question.

It is probably safe to assume that the delegates from South Carolina knew their own constitution. Their state voted for the “declare war” language. What did its delegates understand those words to mean when they voted on the Madison/Gerry motion? Several statements by members of South Carolina’s delegation made at various points in the framing and ratification of the Constitution indicate that they would not have supported language permitting the executive alone to decide on war. Pinckney was not the only delegate from this state to express reservations about executive power over war (“afraid” as he was of the Constitution’s executive becoming a monarchy of “the worst kind”).<sup>168</sup> Rutledge had argued against an executive having the “power of war and peace.”<sup>169</sup> While Butler initially proposed giving the executive the power of making war, he later worried about “ambitious & corrupt Presidents” continuing wars out of self-interest.<sup>170</sup> He also explained to South Carolina’s

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<sup>165</sup> S.C. CONST. art. XXVI (1776).

<sup>166</sup> S.C. CONST. art. XXXIII (1778); *see* YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 149.

<sup>167</sup> *See* YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 149.

<sup>168</sup> 1 CONVENTION RECORDS, *supra* note 41, at 64-65.

<sup>169</sup> 1 *id.* at 65.

<sup>170</sup> 2 *id.* at 541.

ratification convention the Framers' concerns about "throwing" into the president's hands "the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction."<sup>171</sup> In short, contemporary statements indicate that South Carolina's framers would have disputed the inference Yoo draws from their constitution.

Yoo's next argument is based on comparing parts of Article I, section 8, clause 11, which includes the Declare War Clause and also empowers Congress to "grant Letters of Marque and Reprisal" and to "make Rules concerning Captures on Land and Water."<sup>172</sup> According to Yoo, the latter two provisions "clearly" involve the power to "recognize or declare the legal status and consequences of certain wartime actions, and not the power to authorize those actions." He thinks this provides a clue that "declare war" did the same.<sup>173</sup>

The problem with Yoo's argument can be simply stated: that all of these provisions granted power to recognize a legal status does not mean that none of them granted power to authorize the use of force. To take one example, it is not as clear as Yoo claims that the provision regarding letters of marque and reprisal did not empower Congress to authorize action. When Congress sought to protect American commerce from foreign privateers in 1798, one lawmaker specifically referred to the legislative power to "authorize" reprisals. "[T]he President has no power to act" without Congress's approval, said Representative James A. Bayard, as "Congress only could authorize reprisals."<sup>174</sup> This suggests that the letter of reprisal did not just confer a legal status on an earlier use of force. Even Yoo uses the language of authorization when referring to letters of marque and reprisal. He says that they "authorized" a limited form of commercial warfare during the American Revolution.<sup>175</sup>

In his last textual argument, Yoo says that when the Framers used the word "declare" in a "constitutional context," they "usually" used it as courts do: to declare "the state of the law or the legal status" of an event.<sup>176</sup> He cites the Declaration of Independence as a prime example. It did not

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<sup>171</sup> 4 DEBATES, *supra* note 45, at 263.

<sup>172</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>173</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 147; *see also* Delahunty & Yoo, *supra* note 49, at 127.

<sup>174</sup> 8 ANNALS OF CONG. 1828 (1798).

<sup>175</sup> Yoo, Powers of War and Peace, *supra* note 8, at 148.

<sup>176</sup> *Id.* at 149.

authorize military action but only announced a “legal relationship” with England, according to Yoo.<sup>177</sup>

Here, Yoo again sets up alternatives as if they are mutually exclusive: either a declaration affirms the state of the law or it authorizes military action. As with letters of marque and reprisal, it is not necessarily an either/or situation. Something called a declaration can have legal significance while serving other purposes. And if Yoo is correct, it would have the curious consequence that one of the most learned justices on the early Supreme Court lost sight of what “declare” meant in a “constitutional context.”<sup>178</sup> In his influential treatise *Commentaries on the Constitution*, Justice Joseph Story described Congress’s power to declare war as “authorizing” hostilities.<sup>179</sup>

To show that the president can go to war without a congressional declaration, Yoo characterizes the Declaration of Independence as the “nation’s first declaration of war.”<sup>180</sup> He points out that the colonists had been fighting the British before adopting the Declaration of Independence. From this Yoo concludes that the founding generation did not understand the word “declaration” to authorize military action.<sup>181</sup>

Here Yoo forces the argument. If there were colonists who referred to the Declaration of Independence as a declaration of war, Yoo does not identify them. In any event, for the purposes of defining Congress’s power to declare war, the analogy does not hold up. On the one hand, the colonists began fighting the British when it was unclear whether there was an independent nation, the Continental Congress did not have definite authority to declare war in behalf of all thirteen colonies, and the Articles of Confederation had not yet been adopted. On the other hand, the Constitution expressly granted the legislative branch of the new government the power to declare war.

Yoo advertises textual interpretation as a simple exercise that can resolve the important constitutional issue concerning the power to go to war with the definition of “declare” he found in a British dictionary. As the language by itself does not clinch the argument for him, his textual analysis inevitably draws him into historical issues. Repeatedly, the historical context casts doubt on his textual interpretations. Perhaps that is

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<sup>177</sup> *Id.* at 150.

<sup>178</sup> *Id.* at 149.

<sup>179</sup> 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1169 (1833).

<sup>180</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 150.

<sup>181</sup> *Id.* at 149-51; *see also* Delahunty & Yoo, *supra* note 49, at 152.



why he turns to the Constitution's structure for a "sharper" explanation of his position.<sup>182</sup>

### III. YOO'S STRUCTURAL ARGUMENTS

Over thirty-five years ago, Charles L. Black Jr. brought to light the importance of structural analysis in constitutional interpretation,<sup>183</sup> which he described as a "method of inference from the structures and relationships" created by the Constitution.<sup>184</sup> Since then, judges and lawyers have openly embraced structural analysis in constitutional interpretation.

In *The Powers of War and Peace*, Yoo describes the "pro-Congress" argument as an essentially two-part structural claim: (1) the Constitution's structure requires a check on presidential warmaking; (2) the Declare War Clause supplies that check.<sup>185</sup>

Against this, Yoo points first to Congress's power of the purse. As the legislature controls military appropriations, he thinks it "already possesses all the power it needs" to stop the president from going to war. Lawmakers can refuse "to authorize the existence of armed forces."<sup>186</sup> Or Congress can "easily forestall hostilities" by not voting for "additional money" to fund particular wars.<sup>187</sup> It is easy, according to Yoo, because of inertia. Congress can check presidential war initiatives "*simply by refusing to do anything*"—"by not taking the affirmative step of voting funds."<sup>188</sup> Thus, he thinks that using the Declare War Clause to check the president "solves a constitutional problem that is not really there."<sup>189</sup>

Yoo argues as if an overriding constitutional principle limits Congress to one power for one purpose.<sup>190</sup> There is no such principle. The Constitution's structure is built on overlapping powers and secondary checks. As a general proposition, the Framers valued having a "double security" to limit the government's powers (Madison's description of the counteractive effects of the federal and state governments).<sup>191</sup> Considering

<sup>182</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 152.

<sup>183</sup> See Charles L. Black Jr., Structure and Relationship in Constitutional Law (1969).

<sup>184</sup> *Id.* at 7.

<sup>185</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 152.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 22, 152.

<sup>188</sup> *Id.* at 22, 154 (emphasis added).

<sup>189</sup> *Id.* at 152; see also Delahunty & Yoo, *supra* note 49, at 132; Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815 (2006).

<sup>190</sup> See, e.g., Yoo, *supra* note 37, at 197 n.158.

<sup>191</sup> THE FEDERALIST NO. 51 (James Madison).

the practical difficulties Congress faces in using its power of the purse to check presidential warmaking, it would be especially useful to have a double security here. The basic problem with Yoo's argument is that the appropriations process does not work as "easily"<sup>192</sup> as he suggests. Yoo states that Congress could refuse to authorize the "existence" of the military,<sup>193</sup> but that constitutes no real check on the president. Yoo also leaves the impression that the budgetary process invariably provides Congress with the opportunity to review—and stop—military operations before the president takes action.<sup>194</sup> That is not the case. From airstrikes to invasions, presidents have used military force without getting appropriations specifically designated for those actions beforehand.<sup>195</sup>

Once a military campaign is underway, Congress's ability to check the president through the appropriations process is significantly diminished. One explanation given for this is grounded in politics. Incumbents who vote against funding risk being charged with endangering troops already in hostile situations. Yoo writes that off as a "failure of political will"<sup>196</sup>—a problem not rising to the level of constitutional concern.<sup>197</sup> Yet more is involved in withholding funds from ongoing military operations than a test of political will. Once the president embarks on a particular course of action, the decision-making process is skewed. Lawmakers who would have opposed the initial decision to use force may reasonably conclude, with troops already engaged, that a forced withdrawal could undermine American interests.<sup>198</sup> Disengagement could be construed as a sign of weakness abroad. Policy options can be dramatically reduced. The recent experience in Iraq demonstrates this vividly.<sup>199</sup>

Relying on the appropriations process is not the cure-all Yoo suggests. At a minimum, it has been an unwieldy instrument for Congress to monitor

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<sup>192</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 22.

<sup>193</sup> *Id.* at 152; *see also* Nzelibe & Yoo, *supra* note 8, at 2521-22.

<sup>194</sup> Yoo, Powers of War and Peace, *supra* note 8, at 154.

<sup>195</sup> Military actions taken by presidents without Congress's prior approval include invading Grenada (October 1983), bombing Libya (April 1986), invading Panama (December 1989), and bombing Baghdad (June 1993). *See* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING 68-69, 74-76, 80-82 (2000).

<sup>196</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 159.

<sup>197</sup> *See id.* at 143.

<sup>198</sup> The first Persian Gulf War illustrates how the decision-making process can be skewed, as Congress debated authorizing the president to use force against Iraq after President George H. W. Bush had already sent 580,000 troops there, ostensibly for defensive purposes (Desert Shield).

<sup>199</sup> For some indication of the choices confronting lawmakers to sustain military action abroad, as opposed to deciding to take action in the first place, *see*, for example, Communication from the President of the United States Transmitting a Request for FY 2006 Supplemental Appropriations, H.R. DOC. No. 90-2 (2006).

the executive, given the size and complexity of the defense and intelligence budgets, with their secret and discretionary accounts, transfers, contingency funds, surplus property, and drawdowns from lump-sum appropriations.<sup>200</sup> If history is any guide, officials in the executive branch will look for ways to circumvent budgetary restrictions imposed by Congress when they want to.<sup>201</sup> This was one of the central issues of the Iran-Contra affair, as members of the Reagan administration solicited funds from foreign governments and private parties to finance military and covert operations in Central America cut off by Congress.<sup>202</sup> Or the president can confront congressional budgetary restrictions directly. The White House will not lack arguments for interpreting appropriations legislation narrowly or labeling such legislation unconstitutional (by claiming that it invades the commander in chief's powers, for example).<sup>203</sup>

Yoo likes to point out that the Framers regarded Congress's power of the purse as a constraint on executive warmaking. Any argument along those lines should take into account the different outlook Americans had when the Constitution was adopted. Many in the founding generation considered the militia the primary bulwark for defending the United States. Amid widespread concern over having a professional standing army,<sup>204</sup> the U.S. Army had fewer than 1,000 regular soldiers when Washington became president.<sup>205</sup> In that context, congressional control over appropriations for the army, with the Constitution's two-year limit, supplied a more meaningful check on executive power than it does today.

Yoo's enthusiasm for Congress's power of the purse raises questions about his agenda. If Congress's appropriations power was a truly effective weapon against presidential warmaking, would he so eagerly present it as

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<sup>200</sup> See, e.g., William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 48-53, 60, 173-75 (1994); Jerry L. McCaffery & L.R. Jones, *Budgeting and Financial Management for National Defense* 221-23 (2004).

<sup>201</sup> See, e.g., Louis Fisher, *The Spending Power, in The Constitution and the Conduct of American Foreign Policy* 232 (David Gray Adler & Larry N. George eds., 1996); Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 52-53 (1990); Barton Gellman, *Secret Unit Expands Rumsfeld's Domain*, Wash. Post, Jan. 23, 2005, at A1.

<sup>202</sup> See BANKS & RAVEN-HANSEN, *supra* note 200, at 58-61; Fisher, *supra* note 201, at 232-37.

<sup>203</sup> See, e.g., Statement on Signing the Department of Defense Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1703-04 (Sept. 29, 2006); Robert F. Turner, *The Power of the Purse, in THE CONSTITUTION AND NATIONAL SECURITY: A BICENTENNIAL VIEW* 80-81 (Howard E. Shuman & Walter R. Thomas eds., 1990).

<sup>204</sup> See, e.g., 3 CONVENTION RECORDS, *supra* note 41, at 207 (indicating that a standing army was considered an "engine of arbitrary power").

<sup>205</sup> See Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 116 (1976).

an alternative to declaring war?<sup>206</sup> He has forcefully pressed the case for executive authority to start wars.<sup>207</sup> He believes we “must have the option” today “to use force earlier and more quickly than in the past.” He worries about “the vetoes of multiple decision-makers” blocking the president.<sup>208</sup> Yoo has spoken approvingly of presidents taking the initiative with Congress’s budgetary powers coming into play later. Frankly, Yoo seems to emphasize Congress’s appropriations power precisely because it is an ineffectual constraint on presidential warmaking power.

Yoo’s next structural argument is no more convincing. He seeks to compare the Constitution’s “decisional processes.”<sup>209</sup> When the Constitution “divides and allocates executive powers through a specific process,” Yoo says, “it does so far more clearly” than the Declare War Clause does.<sup>210</sup> He points to several constitutional provisions. One empowers the president, “by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.”<sup>211</sup> Another states that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” officers of the United States.<sup>212</sup> Yoo also notes procedures for enacting legislation and amending the Constitution. Had the Framers wanted to “establish a system that requires *ex ante* congressional approval” for going to war,<sup>213</sup> Yoo argues, “we would expect the constitutional text to establish as detailed a procedure for warmaking,”<sup>214</sup> with the president having power, “by and with the advice and consent of Congress, to engage in War.”<sup>215</sup>

The main difficulty with Yoo’s argument is that the process for declaring war materially differs from his examples. The Constitution lists the power to declare war among Congress’s enumerated powers (others include the power to “borrow Money”<sup>216</sup> and to “regulate Commerce”).<sup>217</sup> Congress exercises these powers through its normal process with both houses participating in the decision by majority vote. In each of Yoo’s

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<sup>206</sup> Lynn Chu & John Yoo, *Why are the Pacifists So Passive?*, N.Y. TIMES, Feb. 12, 2007, at A21.

<sup>207</sup> See, e.g., Yoo, A President Can Pull the Trigger, *supra* note 8.

<sup>208</sup> Yoo, Powers of War and Peace, *supra* note 8, at x.

<sup>209</sup> *Id.* at 152.

<sup>210</sup> *Id.* at 153.

<sup>211</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>212</sup> *Id.*

<sup>213</sup> Yoo, Powers of War and Peace, *supra* note 8, at 153.

<sup>214</sup> *Id.* at 154.

<sup>215</sup> *Id.* at 153.

<sup>216</sup> U.S. CONST. art. I, § 8, cl. 2.

<sup>217</sup> *Id.* art. I, § 8, cl. 3.

examples, the Constitution prescribes a more complicated decision-making process. Only the Senate ratifies treaties, which require the approval of two-thirds of senators present.<sup>218</sup> Appointments do not require a two-thirds vote, but again, only the Senate is involved, and the Constitution makes distinctions among appointees (the president appoints officers of the United States; courts and heads of departments may appoint inferior officers).<sup>219</sup> Congress can propose constitutional amendments by a two-thirds vote of both houses; state legislatures can do so through conventions (two-thirds again). Ratification requires the approval of three-fourths of the states.<sup>220</sup> Enacting legislation also has its procedural quirks (e.g., presentment to the president, veto, override by two-thirds in each chamber, pocket veto after ten days).<sup>221</sup>

In short, the Framers had good reason to spell out the decision-making process in each of these cases. The implicit assumption of Yoo's structural argument on decision-making processes is that the Framers shared his view of the Declare War Clause. Yet the historical evidence suggests otherwise.<sup>222</sup> If they believed the Constitution was clear on this point—that Congress had the authority to decide on war—they would have had no reason to think they had to spell out that particular decisional process in more detail. And if we are paying close attention to the structural allocation of constitutional powers, Congress would lose something by Yoo's suggestion, as presidents would be given an opening to claim they had Congress's implied consent to go to war.

Yoo's next structural argument is even easier to dispatch. He imagines a case where the president refuses to order troops into battle after Congress declared war. "Without the commander in chief's cooperation," Yoo says, "no real war would occur." From that hypothetical, Yoo concludes that Congress cannot be said to have the "sole" authority to begin hostilities.<sup>223</sup> Here Yoo is playing with semantics. Congress can have the authority to decide on war while other parties are needed to implement its decision, including the troops as well as the president.

Despite the problems with the structural arguments Yoo offers in The Powers of War and Peace, there is something to be said for considering the Constitution's structure on this issue. Structural interpretation, as Charles

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<sup>218</sup> *Id.* art. II, § 2, cl. 2.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* art V.

<sup>221</sup> *Id.* art. I, § 7, cl. 1.

<sup>222</sup> See *supra* notes 93-116 and accompanying text.

<sup>223</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 155.

Black described it, holds out the promise of enabling us “to talk sense” when the textual method “forces us to blur the focus and talk evasively.”<sup>224</sup> So it is with the Declare War Clause. With textual interpretation, Yoo has us contemplating such things as how Samuel Johnson defined the word “declare” 250 years ago.<sup>225</sup> Textual arguments centering on the word “war” have led to claims that police actions (Korea) and military operations for collective self-defense (Vietnam) were not wars for constitutional purposes. The interpretation of the word “war” did not reflect what was taking place. By contrast, structural analysis, though often based on “deceptively simple logical moves,”<sup>226</sup> can focus the constitutional debate over what is really in question when committing the nation to war.

While at the Justice Department, Yoo outlined additional structural arguments based on the idea of the unitary executive, and these arguments provide a framework for further analysis. The “centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy,” Yoo wrote, “where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with speed and energy that is far superior to any other branch.”<sup>227</sup> Yoo added that the Framers expected the “process for warmaking” to be flexible, with the executive “capable of quicker, more decisive action, than the legislative process.”<sup>228</sup>

This draws on an old argument from the founding. In *The Federalist*, Hamilton pointed to the “decision, activity, secrecy, and dispatch” that “generally characterize the proceedings of one man” compared with “the proceedings of any greater number.”<sup>229</sup> Taken as a general proposition (as Hamilton’s own wording suggested), this seems sensible, considering the basic distinction between a single chief executive with command authority over an entire branch of government and a bicameral legislature consisting of several hundred members.

The specific issue, though, is whether that structural comparison means the president has plenary authority to decide on going to war. In answering that, Yoo makes some questionable assumptions.

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<sup>224</sup> BLACK, *supra* note 183, at 13, 14.

<sup>225</sup> See YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 145.

<sup>226</sup> BOBBITT, *supra* note 25, at 74.

<sup>227</sup> Memorandum, *supra* note 1.

<sup>228</sup> *Id.*

<sup>229</sup> THE FEDERALIST No. 70 (Alexander Hamilton).

When Yoo discusses the need for flexibility in the process for warmaking, he creates a false dilemma. He suggests that the president has discretionary power to start wars or that the president must secure prior authorization from Congress through a “fixed, legalistic process.”<sup>230</sup> For Yoo, the latter would inevitably hamper the government’s ability to respond to terrorist threats.<sup>231</sup> Yet even if Congress has the power to decide whether to go to war, the president retains substantial powers to respond quickly to defend the country. No lawmaker would insist on Congress deliberating while terrorists set off weapons of mass destruction in the United States. Americans who lived with the risk of nuclear attack during the Cold War accepted the president’s authority to respond to the Soviet Union without waiting for the results of legislative debate. Additionally, Congress has demonstrated that it can move quickly to authorize the use of military force. Three days after September 11, the Senate voted 98-0 to authorize the president to use force in response to the attacks,<sup>232</sup> and the House approved the measure a few hours later (420-1).<sup>233</sup> Another four days passed before the president signed it.<sup>234</sup> The last time Congress declared war in response to an attack on the United States, it did not take lawmakers long to do so. The Senate (82-0) and the House (388-1) issued a declaration of war thirty-three minutes after President Franklin D. Roosevelt’s “Day of Infamy” speech.<sup>235</sup> Furthermore, whatever their capacity for dynamic response, presidents do not always react to security threats with speed and energy. While Yoo cleverly aligns his position with flexibility, there is more to constructing an adaptive foreign policy than letting the president initiate military hostilities. Executive decisions on war that appear, in the short term, to reflect a flexible approach may limit policy options over the long run, constraining foreign policymakers and military planners.

Yoo expresses no doubt that the president’s capacity to make decisions in foreign affairs and defense—to “consider policy choices” and to “evaluate threats”—is “far superior” to Congress’s.<sup>236</sup> That overstates the case. Despite the imperfections of the legislative process, it is hard to

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<sup>230</sup> YOO, POWERS OF WAR AND PEACE, *supra* note 8, at 8.

<sup>231</sup> See, e.g., Yoo, *Wartime Powers*, *supra* note 8.

<sup>232</sup> 147 CONG. REC. S9421 (Sept. 14, 2001).

<sup>233</sup> 147 CONG. REC. H5683 (Sept. 14, 2001).

<sup>234</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 n.4 (2005).

<sup>235</sup> See Frank L. Kluckhohn, *U.S. Declares War, Pacific Battle Widens*, N.Y. TIMES, Dec. 8, 1941, at A1.

<sup>236</sup> Memorandum, *supra* note 1.

reach such an unqualified conclusion. Seemingly for every example where executive decision-making works well, another can be cited exposing its deficiencies. President John F. Kennedy's management of the Cuban missile crisis, though not without its critics, is often cited as a classic model of decision-making in crisis. The same president's handling of the Bay of Pigs invasion has been roundly criticized.<sup>237</sup>

As Yoo presents his argument on executive decision-making, it does not matter who occupies the office of the president. In fact, that can make a good deal of difference. With the presidency structured around one individual, the decision-making process is shaped by the chief executive's native abilities, judgment, and experience.<sup>238</sup> A whole range of personal qualities may affect the president's decision on whether to take the nation to war: how the president assesses risk (especially with the uncertain conditions that prevail in foreign affairs); whether he or she engages in wishful thinking; whether he or she is practical, flexible, and open-minded.<sup>239</sup>

While every president consults with advisers, small group dynamics add another layer of difficulties in the executive decision-making process. Even talented White House staffers and independent-minded cabinet secretaries succumb to groupthink, as it has been called—the overt and subtle pressures driving group cohesiveness that can distort the decision-making process.<sup>240</sup> This effect can be pronounced in foreign policy, with stressful crises that often involve morally difficult choices.<sup>241</sup> Members of the president's team, not fully aware they are doing so, may overrate their own power or moral position, cut off the flow of information, downplay contrary views of outside experts, limit consideration of long-term consequences, underestimate the risks of a particular policy, or fail to develop contingency plans.<sup>242</sup> Once the group coalesces around a particular view, it becomes increasingly difficult for individual members to

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<sup>237</sup> See Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* 14-47, 132-58 (2d ed. 1983). See generally Gary R. Hess, *Presidential Decisions for War: Korea, Vietnam, and the Persian Gulf* (2001).

<sup>238</sup> See JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* 3-11 (2d ed. 1985); Alexander L. George, *Assessing Presidential Character*, in *Presidential Personality and Performance* 152-59 (Alexander L. George & Juliette L. George eds., 1998).

<sup>239</sup> See Alexander L. George, *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice* 25-27, 49, 66-71 (1980).

<sup>240</sup> See generally Janis, *supra* note 237, at 2-13, 174-77.

<sup>241</sup> See *id.* at 250-51; GEORGE, *supra* note 239, at 93.

<sup>242</sup> See JANIS, *supra* note 237, at 244.



press the group to reassess rejected alternatives.<sup>243</sup> The unique circumstances of working for the president can make matters worse. Members of the administration generally share the president's outlook, ideology, and policy preferences. Internal decision-making may get skewed because executive officials give advice based on what they think the president wants to hear. Even if the president's subordinates differ with the chief executive on particular questions, they can only go so far to challenge the president.<sup>244</sup>

In short, there are more questions surrounding presidential decision-making on war than Yoo is willing to admit. Congress, with the president still involved, may be able to offset the structural disadvantages of a decision-making process taking place behind closed doors in the White House. While the executive branch tends to concentrate command authority in one person, power is dispersed on Capitol Hill. Not all members of Congress are equal, but no person has influence comparable to the president's power within the executive branch. In comparison with the select handful of advisers who have the most influence with the president, the number of elected legislators and their diverse ideologies, constituencies, and perspectives make them less susceptible to groupthink. Contrary to the president's decision-making process, insulated by executive privilege, the legislative process involves on-the-record votes and speeches by elected representatives and thus provides a forum for public deliberation.<sup>245</sup>

To be sure, Congress is not an idealized debating society. Lawmakers have parochial concerns. They often bargain in private. Their public debates can be grounded in emotional appeals as much as reason.<sup>246</sup> Yet in his eagerness to rate the president far above Congress in deciding to go to war, Yoo overlooks the value in having a decision-making process conducted in relatively open view and the possibilities for lawmakers to engage in serious deliberations on vital questions of national security.<sup>247</sup>

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<sup>243</sup> See GEORGE, *supra* note 239, at 94-96.

<sup>244</sup> See *id.* at 122-133.

<sup>245</sup> See generally JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 28-33, 150-176 (1994); Paul J. Quirk, *Deliberation and Decision Making*, in *The Legislative Branch* 314-48 (Paul J. Quirk & Sarah A. Binder eds., 2005).

<sup>246</sup> See Quirk, *supra* note 245, at 320-21.

<sup>247</sup> See Yoo, *supra* note 7; Nzelibe & Yoo, *supra* note 8, at 2517, 2522-26; see also Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 *MICH. J. INT'L L.* 1239, 1243-51 (2006).

As the inquiry into the Constitution's structure moves beyond the text to consider values implicit in the constitutional framework, it leaves us with a basic question. If the Framers had not expressly granted Congress the power to declare war, would we be inclined to find that, as a structural corollary to the way American constitutional government is set up, Congress has the implied power to determine when to take the nation to war? Structural arguments may be advanced to support both sides on this question. At a minimum, this Essay argues, it is not obvious (as Yoo contends) that the president has plenary power to start wars based on constitutional structure.

#### IV. CONCLUSION

This is a critical juncture in the evolution of presidential war powers. Certainly, a number of presidents have used military force without prior legislative authorization, especially during the Cold War. Yet the question has remained whether, and under what circumstances, the president has the constitutional authority to take military action without Congress's approval. September 11 and subsequent events have renewed this question. In that context, John Yoo seeks to give presidential warmaking a constitutional legitimacy it lacked previously. He claims to throw new light on the subject by interpreting the Declare War Clause based on the Constitution's text and structure, anchored in his reconstruction of original understanding.

Meeting Yoo on the grounds he has chosen, this Essay demonstrates that none of his arguments can withstand scrutiny. Many of his claims are based on original understanding, and Yoo does not hesitate to invoke what he believes "the Framers thought" to bolster his case.<sup>248</sup> Yet he invariably discounts what they actually said, as if the Framers unwittingly adopted the language of the Declare War Clause contrary to the understanding they repeatedly described. Yoo imports Samuel Johnson's dictionary definition of "declare" to support his narrow reading of Congress's power under the Declare War Clause, notwithstanding contrary statements specifically interpreting the constitutional phrase "declare war" (e.g., Wilson, Washington, and Hamilton). Indeed, in his "reconstruction" of what Americans must have had in mind when they ratified the Constitution, Yoo consistently rejects relevant statements from those who gave thought to this constitutional issue. Yoo's presentation of historical evidence is

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<sup>248</sup> Yoo, *Powers of War and Peace*, *supra* note 8, at 148.

subject to question at several points, including his use of Blackstone's *Commentaries*, his description of Jefferson's proposal and the Virginia state constitution, and his argument concerning the Massachusetts constitution and the Essex Result .

Yoo's textual arguments fare no better. For an inquiry styled as textual, which might have emphasized linguistic analysis to discover the plain meaning of the words "declare war" without consulting extrinsic sources of evidence, Yoo's textual arguments draw upon collateral sources to a considerable degree. He has canvassed charters of the founding period to locate alternative language which in his view would have confirmed Congress's power to decide on war (e.g., the Treason Clause, South Carolina's consent provision, the Articles of Confederation). Without presenting evidence that the Framers considered these alternatives when adopting the Declare War Clause, Yoo makes it seem as if they explicitly rejected them. Of the alternatives Yoo proposes, some would have failed to clarify Congress's power. Others would have created additional problems. More than once historical context furnishes the answer to the question Yoo poses. He asks, for example, why the Framers defined treason to include levying war instead of declaring war. His explanation (they did not consider declaring war to be a serious matter) would have been enhanced if he at least noted that levying war had long been defined as treason in Anglo-American law. Historical references to letters of marque and reprisal undermine Yoo's suggestion that they were never viewed as an authorization to use force. Historical context, again, diminishes Yoo's effort to derive the meaning of the Declare War Clause from the Declaration of Independence.

Structural analysis affords an opportunity to bring to constitutional interpretation a realistic appraisal of how governmental institutions operate. Yoo misses that opportunity. His structural argument begins with a fanciful assessment of Congress's appropriations power once military action has begun. He overlooks obvious distinctions between declaring war and other decisional processes spelled out in the Constitution, e.g., treaty-making, appointment of officers. As for the institutional capacities of Congress and the president, there is in Yoo's constitutional world a chronically dysfunctional legislature on one side; on the other, the president with the capacity to determine when to take the country to war no matter what special talents he or she brings to the office. The Framers knew better.

No doubt subtle constitutional questions can arise concerning the division of responsibility between Congress and the president involving the use of military force. Yoo states his position in the broadest terms. He tries hard to show that the Declare War Clause does nothing to vitiate the president's inherent power to decide on war without involving Congress. His effort itself suggests how dubious that position is.