BOOK REVIEW

Foreign Affairs and Separation of Powers in the Twenty-first Century

THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11. By John Yoo. Chicago: University of Chicago Press, 2005. Pp. xii, 366. $29.00.

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INTRODUCTION

John Yoo is nothing if not controversial. During his tenure at the Department of Justice's Office of Legal Counsel (OLC), he became widely known for, among other things, drafting the Administration's legal justification for the use of aggressive interrogation techniques.[1] His prior academic writing also frequently staked out bold positions supporting expansive interpretations of executive power in the realm of foreign affairs. Yoo's recent book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, amplifies many of the themes of his earlier work in academia. In it, he addresses two fundamental aspects of foreign policy making, the war power and the treaty power, each of which he analyzes from a decidedly revisionist perspective.

Yoo, who has returned to teaching law at the University of California, Berkeley, remains as provocative as ever in *The Powers of War and Peace*. His discussion of the President's war power is especially notable as he asserts the President has the unilateral authority to take the nation into major

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1. *See, e.g.*, Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1. Unfortunately, a good deal of the criticism directed toward Yoo has been overwrought and *ad hominem*. *See, e.g.*, http://lawofnations.blogspot.com/2005/11/sands-yoo-debate.html (quoting Philippe Sands as saying, in a debate with Yoo: "I suppose it is moderately entertaining to engage with a sparring partner [Yoo] when the use of facts and law are so skewed as to depart entirely from reality. The problem is not renegade actors, the problem, frankly, is renegade lawyers. I'm sorry to say that Professor Yoo is one of them."). For Yoo's spirited defense of the role he played in formulating the Administration's legal positions, see JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

hostilities[2] without *ex ante* authorization from Congress. Yoo's treaty section is divided into four subparts, addressing treaty termination, treaty interpretation, the tension between self-executing and non-self-executing

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2. For purposes of this review, the terms "major" hostilities or "major" conflict amount to "war" in the constitutional sense of the word, meaning a conflict involving a large commitment of troops for a potentially extended period of time, requiring significant funding, and entailing the likelihood of a high number of casualties, but not necessarily involving full mobilization of the nation's resources. *See, e.g.*, John Norton Moore, *The National Executive and the Use of the Armed Forces Abroad*, *in* 2 THE VIETNAM WAR AND INTERNATIONAL LAW 808, 814 (Richard A. Falk ed., 1969) (proposing "[a]s a dividing line for presidential authority in the use of the military abroad, one test might be to require congressional authorization in all cases where regular combat units are committed to sustained hostilities. This test would be likely to include most situations resulting in substantial casualties and substantial commitment of resources."); JAMES GRAFTON ROGERS, WORLD POLICING AND THE CONSTITUTION 87 (1945) ("'war' is considered a special category in the uses of force, apparently confined to cases of great effort, to major contests designed to crush and conquer another nation. The President has been left free, by general public, political and judicial acquiescence to engage without Congressional authority not only in routine protection of our people and property abroad but in enforcing national aims like the establishment of routes of commerce and above all in prolonged and costly police operations."); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 43 (1921) ("By virtue of his position as Commander-in-Chief, as well as by authority of other constitutional and statutory provisions, the President may undertake numerous military measures that are short of actual war."); Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 737 (1996) ("When it comes to real wars – ones that have involved a commitment of [a] sustained and substantial nature – presidents have sought and secured legislative approval.") (book review); *cf.* Joseph M. Bessette, *The War over the War Powers*, CLAREMONT REV. OF BOOKS, Spring 2006, at 20, 21 (reviewing THE POWERS OF WAR AND PEACE) ("One way [proposed by some scholars] to reconcile actual practice with the Constitution would be to . . . draw the line at a conflict like the Korean War, which lasted three years and resulted in more than 33,000 American combat deaths."). Recent examples of major wars would include the Korean War, the Vietnam War, the war in Afghanistan, and both Iraq Wars.

Major hostilities would include as a subset what is often referred to as "total" war. *See, e.g.,* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 4 (1947) (defining total war as "the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological"). An example of total war would be World War II. "Minor hostilities" are conflicts that are not major, that fall "short of actual war." *Cf.* BERDAHL, *supra*.

For purposes of this review, "offensive" hostilities and "initiation" and "commencement" of hostilities mean military actions that do not involve a response to an attack. It is generally agreed that the President may respond to attacks on the United States without first seeking congressional authorization. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., revised ed. 1966) [hereinafter FARRAND] (stating that James Madison and Elbridge Gerry would "leav[e] to the Executive the power to repel sudden attacks"); *id.* (quoting Roger Sherman, who concurred that, "[t]he Executive shd. be able to repel and not to commence war"); *cf.* Durand v. Hollins, 8 Fed. Cas. 111, 112 (S.D.N.Y. (1860) ("as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president").

treaties, and the relationship between Article II, Section 2 treaties and congressional-executive agreements. As a general matter, the treaty section proves the more persuasive of the two major parts of his book, though it too is marked by several shortcomings.

While many, if not most, readers will be unpersuaded by Yoo's more novel arguments – particularly with respect to the war power – his book merits reading, if for no other reason than it represents perhaps the most detailed and forceful work in favor of unilateral presidential war initiation and broad executive foreign affairs power. Yoo undeniably expands the scope of debate in both areas. Ultimately, however, while he adds valuable texture and insight to age-old questions about the relationship between Congress and the President, most of his revisionist arguments are unlikely to overturn accepted understandings of the constitutional allocation of powers in foreign affairs.

I. THE WAR POWER

A. Yoo's Position

Over the course of its history, the United States has entered into hostilities on numerous occasions. Some of these endeavors were major, and these efforts almost without exception received *ex ante* congressional authorization.[3] Others were relatively minor or middling affairs, some of which received prior congressional blessing and many of which did not. One of the most enduring constitutional questions remains: Does the President require prior congressional authorization for all uses of force abroad, only for some, or perhaps even for none? This issue has vexed legal analysts for generations.[4]

Enter John Yoo. In *The Powers of War and Peace*, Yoo stakes out an aggressive pro-executive position, arguing that the President enjoys independent authority to initiate the use of force abroad with little regard for the magnitude of the conflict. Yoo argues that the threats posed by terrorism and weapons of mass destruction constitute imperatives that require a return to the views of the Framers with respect to the constitutional allocation of foreign affairs powers. Contrary to the prevailing scholarly view, he asserts

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3. The Korean War is the one example to the contrary. *See, e.g.,* PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 230 (2002) ("the Korean war is . . . the only major war that Congress did not authorize in advance"). Scholarly opinion has generally viewed initiation of this conflict as having been undertaken unlawfully by President Truman. *See infra* note 81.

4. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (2d ed. 1989); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? (1981); 2 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1969) (including several articles on the subject); ROGERS, *supra* note 2; Albert H. Putney, *Executive Assumption of the War Making Power*, 7 NAT'L U.L. REV. 1 (1927).

that the Framers left open the question of which branch may authorize the initiation of hostilities. According to Yoo, there is no "single, correct method for making war."[5] Instead, the Framers crafted a Constitution with a flexible approach to the war power.[6] From that premise, Yoo builds the argument that the Framers believed that the President could initiate hostilities on his own accord on virtually any scale without prior congressional authorization. Yoo posits further that today's foreign policy threats demand that the President be able to act with dispatch, providing an additional, functional consideration in favor of presidential war initiation.[7]

Yoo justifies this view by pointing to Article II's Vesting Clause, which he asserts provides an important source of presidential war, treaty, and other foreign affairs powers.[8] This provision, found in Article II, Section 1, Clause 1 of the Constitution, provides that "[t]he executive Power shall be vested in a President of the United States of America."[9] Yoo contends that seventeenth- and eighteenth-century notions of executive power must inform any discussion of the Vesting Clause. Since the authority to initiate and conduct hostilities was inherent in these early conceptions of executive power, since (according to Yoo) the Framers fully imported such principles into the Vesting Clause, and since there is no language of limitation introducing Article II comparable to that in Article I,[10] the power to initiate hostilities must therefore belong to the President.[11] Yoo reinforces his textual argument by pointing to the dozens of occasions on which the President has initiated hostilities in the past.[12] Yoo concludes that "the president already has the domestic constitutional authority to initiate military hostilities without any authorizing legislation."[13]

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5. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 viii (2005).

6. Yoo fails to explain why, if the Constitution should be more supple in the realm of foreign affairs, *see, e.g., id*. at viii, 8-11, the means for initiating hostilities should be flexible but the means for entering into and implementing international agreements should not be. *See id*. at 215-292 (laying out Yoo's vision of the treaty power, which counsels against the interchangeability of treaties and congressional-executive agreements and for presumptively requiring the non-self-execution of treaties).

7. *See, e.g.*, *id.* at ix-x.

8. *See, e.g.*, *id.* at 18, 19. The argument that the Vesting Clause is a repository of foreign affairs powers is not airtight, however. *See, e.g*., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

9. U.S. CONST. art. II, §1, cl. 1.

10. *See id*. at art. I, §1, cl. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .") (emphasis added).

11. *See, e.g.*, YOO, *supra* note 5, at 8 ("The president need not receive a declaration of war before engaging the U.S. armed forces in hostilities."); *id*. at 104 ("The executive would have full command of the military and would play the leading role in initiating and ending war."); *id*. at 294 ("the practice of unilateral presidential warmaking falls within the permissible bounds of discretion granted to the political branches"); *id*. ("the president as commander in chief holds the initiative to use force abroad").

12. *See id*. at 12, 143. These presidential actions generally have been minor in scope. *See infra* notes 75-83 and accompanying text.

13. YOO, *supra* note 5, at 165.

Of course, Article I, Section 8 of the Constitution provides that "Congress shall have Power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[14] These clauses, among others,[15] have traditionally been viewed as providing Congress with the power to authorize the initiation and calibration of hostilities.

Yoo is unimpressed by the Declare War Clause. He argues that declarations of war and authorizations to conduct war are two different things:[16] "A declaration does not authorize or make, it recognizes and proclaims."[17] To Yoo, the constitutional text "suggests that declaring war recognized a state of affairs – clarifying the legal status of the nation's relationship with another country – rather than authorized the creation of that state of affairs."[18] Yoo stresses that, if the Framers had wanted Congress to have the authority to provide *ex ante* authorization for the use of force, they would have used the term "authorization" and not "declaration" in Article I. To Yoo's way of thinking, declarations of war merely express to international and domestic audiences that a state of hostilities exists between two or more nations. As for checks and balances, if Congress disagrees with the presidentially-initiated hostilities, it can cut off funding for the war effort through its appropriations power.[19]

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14. U.S. CONST. art. I, §8, cl. 11.

15. *See infra* notes 23-31 and accompanying text (discussing other possible textual bases for congressional authority over war initiation); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2064-2065 (2005); *cf.* CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 36 (1986).

16. *See* YOO, *supra* note 5, at 144-152; *see also id.* at 144 ("it is apparent that Congress's power to 'declare war' is not synonymous with the power to begin military hostilities.").

17. YOO, *supra* note 5, at 149. Michael Ramsey has argued that declarations of war in the seventeenth and eighteenth centuries were more than mere proclamations, they also encompassed acts that initiated states of war. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1590-1596 (2002). If correct, this would seem to chip away at Yoo's thesis, which relies in no small part on the notion that declarations of war prior to 1787 were mere formalities and played little or no role in the actual initiation of hostilities.

18. *See* YOO, *supra* note 5, at 145; *see also id.* at 33 (noting Grotius's and Vattel's views of declarations of war, which were "[w]ell known to the Framers [and which interpreted such actions] . . . . as a courtesy to the enemy and a definition of the status of their relations under international law"); *id.* at 147 ("Two additional clues suggest that 'declare war' served as a recognition of the legal status of hostile acts, rather than as a necessary authorization for hostilities."); *id.* at 148 ("Other foundational documents of the period demonstrate that the Framers thought of the power to begin hostilities as different from the power to declare war."); *id.* at 151 ("Declarations of war serve a purpose, albeit one that does not amount to the sole authority to initiate hostilities. Declarations do simply what they say they do: they declare."); *see also id.* at 89 ("Some Framers initially hoped to place Congress at the fore in decisions on war, but this approach did not prevail.").

19. *Id.* at 294 (the Power of the Purse "renders unnecessary any formal process requirement for congressional authorization or a declaration of war before hostilities may begin").

Yoo ignores the central importance of the distinction between Congress authorizing (or not authorizing) hostilities before a conflict and Congress' ability to "pull the plug" once hostilities have begun. *See, e.g.*, *id.* at 154. Authorizing war means deciding policy (or at least

B. Evaluating Yoo's War Power Argument

In evaluating Yoo's position on the war power, the question is not whether he has set out a thoughtful position – he certainly has.[20] Yoo's textual analysis provides much food for thought, and the breadth of his knowledge of British, colonial, and post-Revolutionary history (constitutional and otherwise) is impressive. Likewise, his discussion of the great seventeenth- and eighteenth-century commentators is well done. Moreover, from an originalist standpoint, he makes about as persuasive an argument in favor of presidential war initiation as can be made. The question is, when compared to the traditional position that Congress must provide *ex ante* authorization for the use of force (or at least for the use of major, offensive force), is Yoo's view the more persuasive position? The answer is almost certainly no.

There are a host of problems with Yoo's approach to the war power. First, as a textual matter, Yoo's position does not seem to reflect the most logical reading of the Constitution. Taken together,[21] Article I's references to

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participating in policymaking), as opposed to merely responding to or trying to undo a policy that is already in place.

Of course, hostilities begun unlawfully or with questionable legality can still be cured through explicit, retroactive legislative sanction. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 670-671 (1863) ("If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress '*ex majore cautela*' and in anticipation of such astute objections, passing an act 'approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.' Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, '*omnis ratihabitio retrotrahitur et mandato equiparatur*,' this ratification has operated to perfectly cure the defect.") (emphasis in original). Implicit, retroactive congressional approval through the appropriations process and reauthorization of the draft may also legitimize hostilities initiated by the President. *See infra* note 75.

Yoo also argues that congressional participation prior to initiation of a conflict is unnecessary precisely because Congress has other means of checking presidential actions. *See* YOO, *supra* note 5, at 294 (arguing that the appropriations power "renders unnecessary any formal process requirement for congressional authorization or a declaration of war before hostilities may begin"); *see also id*. at 152 ("Reading the Declare War Clause to check the president solves a constitutional problem that is not really there."). This argument is dubious at best. The Framers provided a number of different checks and balances to both branches, but Yoo would apparently limit Congress to just one, the power over spending. Yoo's view is akin to arguing that the President should not be permitted to veto a declaration of war of which he disapproves since as Commander in Chief he can otherwise check Congress's actions by refusing to deploy the military.

20. Some other reviewers have rightly acknowledged Yoo's effort in this respect. *See, e.g.*, Bessette, *supra* note 2, at 22-23.

21. *See, e.g.*, Bradley & Goldsmith, *supra* note 15, at 2064-2065; *cf.* LOFGREN, *supra* note 15, at 36.

declaring war,[22] issuing letters of marque and reprisal,[23] promulgating rules concerning captures on land and sea,[24] defining and punishing actions committed on the high seas and offenses against the Law of Nations,[25] supporting and raising the military forces,[26] making rules for the governance of land and naval forces,[27] calling forth, arming, and disciplining the militia,[28] and providing funds for the foregoing[29] would seem to indicate that the Constitution provides Congress with the power to authorize and determine the type of military force to be used[30] – be it "perfect" (declared) war, or "imperfect" (undeclared) war.[31] These clauses also reflect that Congress's war

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22. *See* U.S. CONST. art. I, §8, cl. 11.
23. *See id.*
24. *See id.*
25. *See id.* at cl. 10.
26. *See id.* at cls. 12, 13.
27. *See id.* at cl. 14.
28. *See id.* at cls. 15, 16.
29. *See id.* at cls. 1, 12; *id.* at art. I, §9, cl. 7.
30. The apparent textual grant (or grants) of authority to Congress to decide whether to use military force lie in some tension with the common practice of presidents sending U.S. forces into minor hostilities or potential harm's way without prior congressional authorization. Presumably, the President in such circumstances is acting in what Justice Jackson memorably termed the "zone of twilight" in which Congress has yet to act, leaving the President some degree of flexibility to act until Congress occupies the field. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
31. *See, e.g.*, *infra* notes 51-54 and accompanying text (discussing *Bas v. Tingy* and *Talbot v. Seeman*); Thomas Jefferson, *Mediterranean Trade* (Dec. 28, 1790), 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS 104, 105, *quoted in* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 348 (2001) (while Secretary of State, Jefferson wrote: "Upon the whole, it rests with Congress to decide between war, tribute, and ransom, as the means of reestablishing our Mediterranean commerce. If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the cooperation of other Powers. If tribute or ransom, it will rest with them to limit and provide the amount; and with the Executive, observing the same constitutional forms, to make arrangements for employing it to the best advantage."); *cf.* 3 THE FOUNDERS' CONSTITUTION 94-95 (Philip B. Kurland & Ralph Lerner, eds. 1987) (quoting James Wilson: "The power of declaring war, and the other powers naturally connected with it, are vested in congress. To provide and maintain a navy – to make rules for its government – to grant letters of marque and reprisal – to make rules concerning captures – to raise and support armies – to establish rules for their regulation – to provide for organizing, arming, and disciplining the militia, and for calling them forth in the service of the Union – all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.").

William Blackstone noted with respect to the issuance of letters of marque and reprisal under the British Constitution – a power granted to Congress under the U.S. Constitution – that such authority was "nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 250(Stanley N . Katz ed., 1979) (1765) .

Congressional authority to put the United States on a war footing is reinforced by other important non-military legislative powers. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 192 (1824) (Marshall, C.J.) (an embargo "may be, and often is, used as an instrument of war"); LOUIS FISHER, PRESIDENTIAL WAR POWER 6 (1995).

power comes from more than just the Declare War Clause.[32]

Yoo seems incorrectly to view the Declare War Clause as the only source of Congress's power to authorize the initiation of hostilities.[33] For his argument to succeed, Yoo first needs to overcome the imposing hurdle of the Declare War Clause. He labors mightily to do so, but in the end he is unsuccessful. He also essentially needs to convince the reader that none of the other pertinent clauses provides congressional power to authorize hostilities. This effort also fails. Moreover, Article I, Section 10 of the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[34] If the power to commence hostilities lies with either the President *or* Congress, as Yoo asserts, why is there no provision for presidential approval? If Yoo's theory held true, Article I, Section 10's language should read "[n]o State shall, without the Consent of Congress *or the President*, . . . engage in War . . . ." In sum, although the constitutional text is not without some ambiguity as to which branch enjoys the authority to initiate major hostilities, it does clearly tend to favor Congress rather than the President.

A second problem with Yoo's approach is that, while he rightfully places great emphasis on the views of the Framers, he ends his discussion of their views prematurely, since for the most part he fails to consider statements made after the conclusion of the state ratifying conventions.[35] Despite the weight that courts and other government officials have long placed on early constitutional practice as evidence of what the Framers thought,[36] this important segment of the historical record is ignored by Yoo in his war power discussion. Yet, Yoo has no problem relying upon postratification materials in other parts of his book when they favor his position, such as in the context

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32. *See* Bradley & Goldsmith, *supra* note 15, at 2064-2065; *cf*. LOFGREN, *supra* note 15, at 36.

33. *See, e.g.*, YOO, *supra* note 5, at 139-142. Yoo spends only a brief segment on letters of marque and reprisal and does not discuss the other Article I, Section 8 powers at any length. *See id*. at 147-148.

34. U.S. CONST. art. I, §10, cl. 3. That this provision appears in Article I is likely not without significance. *See* LOFGREN, *supra n*ote 15, at 14-16.

35. *See, e.g.*, YOO, *supra* note 5, at 27-29. Concern about this methodology has not escaped the notice of other reviewers. *See, e.g*., Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1466-1470 (2006) (reviewing THE POWERS OF WAR AND PEACE). Yoo tries to sidestep later sources by narrowing the field of play to his advantage. *See* YOO, *supra* note 5, at 28 ("If we begin, however, at the normative starting point that the Constitution's legitimacy derives from its popular ratification, a narrower set of sources becomes authoritative."). While heavy reliance upon the ratifying conventions is certainly warranted, Yoo's reliance on them to the exclusion of postratification materials leaves his analysis incomplete. This pinched interpretation of what should be viewed as "authoritative" statements by the Framers is certainly at odds with the Supreme Court's traditional embrace of postratification materials in its constitutional interpretation. *See infra* note 45.

36. *See infra* note 45.

of the treaty power.[37] Yoo never explains why such emphasis is appropriate with respect to aspects of the treaty power but not in the case of the war power.

As has been rightly noted elsewhere,[38] this reflects a broader problem: Yoo rarely confronts contrary historical evidence. His discussion of the Founders is one of the more glaring examples. If one were wading into the debate over the proper allocation of the war power for the first time, reading Yoo's book would leave one largely unaware of the fact that Washington,[39] Jefferson,[40] Hamilton,[41] and Madison[42] all interpreted the Constitution to mean

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37. *See* YOO, *supra* note 5, at 234 (stating in the context of treaties that "[w]hile not as relevant as the records of the ratification debates . . . postratification evidence can show how the Constitution's structures worked in practice."); *see also id*. at 18, 19, 183, 191, 233, 241, 242, 243-244 (citing postratification statements by Washington, Jefferson, Madison, Marshall and Hamilton in contexts not involving the war power). Other reviewers have also noted this inconsistency. *See, e.g.*, Ramsey, *supra* note 35, at 1471.

38. *See, e.g.*, Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21, 23-24 (reviewing THE POWERS OF WAR AND PEACE).

39. *See Letter from George Washington to Governor William Multrie* (Aug. 28, 1793), *in* 33 THE WRITINGS OF GEORGE WASHINGTON 73, 73 (John C. Fitzpatrick ed., 1940) ("The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated on the subject, and authorized such a measure."); 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 221 (Clarence Edwin Carter ed., 1936) (quoting the statement of Secretary of War Knox that President Washington "does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.").

40. *See Letter from Thomas Jefferson to James Madison* (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) ("We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."); 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 327 (James D. Richardson ed., 1896) [hereinafter MESSAGES] (quoting President Jefferson as stating in 1801 that "[t]he Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries . . . in the exercise of this important function confided by the Constitution to the Legislature exclusively "); *id.* at 389 (quoting President Jefferson as stating in 1805 that "Congress alone is constitutionally invested with the power of changing our condition from peace to war"); *see also* http://etext.virginia.edu/jefferson/quotations/jeff1475.htm (providing other Jefferson quotations supporting congressional authority to authorize war).

41. *See Letters of Pacificus* No. 1, *in* 4 THE WORKS OF ALEXANDER HAMILTON 432, 443 (Henry Cabot Lodge ed., 1904) (stating that "the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of war . . . . It is the province and duty of the Executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the nation in a state of war.").

It is important to note that Hamilton, perhaps the preeminent advocate of executive power among the Framers, while writing in the *Pacificus* letters, themselves influential endorsements of executive power, clearly equated a declaration of war with an authorization. Hamilton was not alone in this interpretation. *See, e.g.*, *supra* note 39 (Washington); *infra* note 42 (Madison); *see also Examination of Jefferson's Message to Congress of December 7, 1801*, No. 1, *in* 8 THE WORKS OF ALEXANDER HAMILTON at 246, 249 (Henry Cabot Lodge ed., 1904) ("'The Congress shall have power to declare war'; the plain meaning of which is that, it is the peculiar and

that Congress must authorize hostilities before the President may lawfully undertake offensive military action. Any number of other Founders and their contemporaries expressed similar sentiments.[43] Moreover, unlike other parts

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exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only, *to go to war*."); *cf.* 1 FARRAND, *supra* note 2, at 292 (quoting Hamilton's constitutional plan as one under which the Senate would "have the sole power of declaring war" and the Executive would "have the direction of war when authorized or begun"); LOFGREN, *supra* note 15, at 13.

42. *See Letters of Helvidius*, No. 1 (Aug.-Sept. 1793), *in* 6 THE WRITINGS OF JAMES MADISON 138, 148 (Gaillard Hunt ed., 1906) ("Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether a *war ought* to be *commenced, continued*, or *concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.") (emphasis in original); *Letter from James Madison to Thomas Jefferson* (June 13, 1793), *in id.* at 130, 131 (writing that "[t]he right to decide the question whether the duty & interest of the U.S. require war or peace under any given circumstances, and whether their disposition be toward the one or the other seems to be essentially & exclusively involved in the right vested in the Legislature, of declaring war in time of peace"); *Letter from James Madison to Thomas Jefferson* (Apr. 2, 1798), *in id.* at 311, 312 (writing that the Constitution "with studied care, vested the question of war in the Legisl."); *id*. at 174 ("Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war . . . . In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department. . . . the trust and the temptation would be too great for any one man"); 1 MESSAGES, *supra* note 40, at 504-505 (quoting President Madison: "Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of Events . . . is a solemn question which the Constitution wisely confides to the legislative department of the Government."); *cf*. 1 FARRAND *supra* note 2, at 70 (quoting Rufus King's notes on the convention: "Mad: agrees wth. Wilson in his difinition of executive powers – executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined").

Despite taking divergent views about the distribution of foreign affairs power in other respects – highlighted most dramatically in the Pacificus/Helvidius exchange – both Hamilton and Madison agreed that the constitutional authority regarding commencement of war was vested in Congress. *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 4, at 30-31. Yoo discusses the famous exchange in his section on treaties, *see* YOO, *supra* note 5, at 203-204, but he makes little effort to reconcile the statements by Hamilton and Madison about the war power with his own view of executive authority.

43. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836-1845) (repr. ed. 1937) (quoting James Wilson as stating that the new constitution would not "hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large."); *cf*. 1 FARRAND, *supra* note 2, at 64-65 (Charles Pinckney favored "a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."); *id.* at 65 (John Rutledge "was not for giving [the Executive] the power of war and

of the Constitution, the question of which branch (or branches) may authorize the initiation of hostilities does not appear to have been one where the Framers argued one way at one point in their careers and then took the opposite position later.

Yoo defends his approach by arguing that "we should not look exclusively at what a particularly influential Framer said about the [Declare War] provision at the Federal Convention. To better understand the historical context, we should look to the British constitution in the seventeenth and eighteenth centuries, state constitutions, and the Articles of Confederation."[44] This presents a false choice between British/state constitutions and the Articles of Confederation, on one hand, and the words of the Framers at the Constitutional Convention, on the other. Both sets of materials should be consulted.

Furthermore, there is a world of difference between relying *exclusively* on what "a particularly influential Framer said . . . at the Federal Convention" and simply giving due weight to the repeated, unambiguous statements of the most prominent Framers over the course of the Constitution's formative period. Omitting what the Framing generation wrote after the convention and ratification debates provides an incomplete rendering of what the Framers thought. Moreover, the Supreme Court has repeatedly stressed the importance of the interpretation applied to the Constitution and implemented by the Framers.[45]

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peace"); 2 FARRAND, *supra* note 2, at 318 (quoting Roger Sherman that the "Executive shd. be able to repel and not to commence war."); *id*. (Elbridge Gerry "never expected to hear in a republic a motion to empower the Executive alone to declare war"); *id.* at 319 (Pierce Butler "moved to give the Legislature power of peace, as they were to have that of war"); *id*. (George Mason "was agst giving the power of war to the Executive, because not (safely) to be trusted with it; . . . He was for clogging rather than facilitating war; but for facilitating peace. He preferred '*declare*' to '*make*'.") (emphases in original); *id*. (Oliver Ellsworth: "there is a material difference between the cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration.") (emphases in original); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT'L L. 903, 912 (1994) (book review) (quoting Jefferson's characterization of Secretary of the Treasury, and former Pennsylvania ratification convention member, Albert Gallatin's position on the war power: "to declare war & to make war is synonymous. The Exve can not put us in a state of war, but if we be put into that state either by the decla of Congress or of the other nation, the command & direction of the public force then belongs to the Exve."); ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 56 (1976) ("Congress was seen by all who commented on the issue as possessing exclusive control of the means of war. No ratifier suggested that the President would be able unilaterally to utilize forces provided for one purpose in some unauthorized military venture.").

44. YOO, *supra* note 5, at 27; *see also id*. at 295.

45. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) ("The construction placed upon the Constitution . . . by the men who were contemporary with its formation . . . is of itself entitled to very great weight"); Prigg v. Pennsylvania, 41 U.S. (16 Pet.)

A third flaw in Yoo's argument is that, after reading his book, one would be unaware of how the Framers actually *went* to war. Yoo's approach, were one to accept it, raises several questions as to why the Framers conducted themselves as they did. If the Framers believed that a declaration of war did not amount to, or go hand in hand with, an authorization for war,[46] and therefore Congress did not need to authorize hostilities beforehand, why did Congress go to the trouble of authorizing the Quasi-War with France in 1798, the nation's first true international conflict under the Constitution?[47] Why did President Jefferson request congressional authorization with respect to the U.S. engagement with the Barbary pirates?[48] Why did Congress declare war

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539, 621 (1842) ("contemporaneous expositions" of the Constitution by the Framers bolster long acquiescence in construction); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."); *see also* 5 ANNALS OF CONG. 701 (1796) (quoting Representative William Vans Murray: "We have all seen the Constitution from its craddle, we know it from its infancy, and have the most perfect knowledge of it, and more light than ever a body of men in any country have ever had of ascertaining any other Constitution.").

46. *See* Bradley & Goldsmith, *supra* note 15, at 2064-2065.

47. Yoo notes only that the Quasi-War did not entail a declaration of war and argues from that premise that "the federal government from its very beginnings has used different constitutional methods for going to war." YOO, *supra* note 5, at 3. Of course, what is omitted is that the conflict was authorized by *Congress*, not the President. Concluding that the President may authorize hostilities because Congress in 1798 authorized an imperfect war instead of declaring war is a leap to say the least. Not only did the President *not* authorize hostilities in 1798, he deferred to the Congress to do so. President Adams stated: "It remains for Congress to prescribe such regulations as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war." 1 MESSAGES, *supra* note 40, at 237. The Adams Administration certainly viewed Congress as having authorized hostilities. *See* 1 OP. ATT'Y GEN. 84 (1798) (indicating that Congress had authorized "maritime war"). The Supreme Court agreed. *See* Bas v. Tingy, 4 U.S. (4 Dal.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801). Moreover, when President Adams deviated from Congress's instructions during the Quasi-War, his actions were deemed unlawful by the Supreme Court. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

Even the greatest advocate of executive power at the time, Alexander Hamilton, was similarly deferential to congressional war power during the Quasi-War. He advised the Secretary of War to "employ the Ships as Convoys with authority to *repel* force by *force*, (but not to capture), and to repress hostilities within our waters including a marine league from our coasts – Any thing beyond this must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war. In so delicate a case, in one which involves so important a consequence as that of War – my opinion is that no doubtful authority ought to be exercised by the President. . . ." 1 NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE: NAVAL OPERATIONS FROM FEBRUARY 1797 TO OCTOBER 1798, at 75-76 (1935).

48. *See* 1 MESSAGES, *supra* note 40, at 327 (quoting President Jefferson in 1801: "[t]he Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries . . . . in the exercise of this important function confided by the Constitution to the Legislature exclusively . . . ").

against Britain in the War of 1812 and in so doing "authorize[]" the President to use military force?[49] Perhaps most notably, why did no American President claim the power to take the nation unilaterally into war during the early years of the Republic?[50] These events all occurred within twenty-five years of the

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Congress ultimately authorized hostilities against the Barbary pirates through no less than ten statutes. *See* FISHER, *supra* note 31, at 26.

49. *See* Act of June 18, 1812, ch. 102, 2 Stat. 755 ("the President of the United States is hereby *authorized* to use the whole land and naval force of the United States [to carry out the war effort] . . . and to issue . . . letters of marque and general reprisal") (emphasis added).

Later statutes involving America's other declarations of war *all* were linked to explicit language authorizing the President to use force. *See* Bradley & Goldsmith, *supra* note 15, at 2062; *see also* Act of May 13, 1846, ch. 16, 9 Stat. 9 ("That, for the purpose of enabling the government of the United States to prosecute said war to a speedy and successful termination, the President be, and he *is hereby, authorized* to employ the militia, naval, and military forces of the United States [to prosecute the war effort]") (emphasis added); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 ("That the President of the United States be, and he hereby *is, directed and empowered* to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States [to carry out the war]") (emphasis added); Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 ("that the President be, and he *is hereby, authorized and directed* to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government") (emphasis added); Act of Dec. 8, 1941, ch. 561, 55 Stat. 795 ("the President *is hereby authorized and directed* to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan") (emphasis added).

The remaining statutes involving the other declarations of war in World War I and II followed the same pattern. *See* Act of Dec. 7, 1917, ch. 1, 40 Stat. 429 (declaration of war against Austria-Hungary); Act of Dec. 11, 1941, ch. 564, 55 Stat. 796 (declaration of war against Germany); Act of Dec. 11, 1941, ch. 565, 55 Stat. 797 (declaration of war against Italy); Act of Jun. 5, 1942, ch. 323, 56 Stat. 307 (declaration of war against Bulgaria); Act of Jun. 5, 1942, ch. 324, 56 Stat. 307 (declaration of war against Hungary); Act of Jun. 5, 1942, ch. 325, 56 Stat. 307 (declaration of war against Romania).

50. *See, e.g.*, Arthur Schlesinger, Jr., *Introduction* to SOFAER, *supra* note 43, at xx ("Professor Sofaer found no instance of any President in the classical period making the claim so common in our own day that Presidents have *inherent* power to initiate military actions.") (emphasis in original). It appears that no President claimed the authority to initiate major hostilities until the Korean War. *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 4, at 28; Louis Fisher, *Scholarly Support for Presidential Wars*, 35 PRES. STUD. Q. 590, 591 (2005).

Moreover, at least twenty presidents, at some point in their public career, either explicitly or implicitly conceded that the power of authorizing the initiation of hostilities lies with Congress. They include Presidents Washington, John Adams, Jefferson, Madison, Monroe, John Quincy Adams, Jackson, Tyler, Buchanan, Lincoln, Grant, Arthur, Cleveland, McKinley, Taft, Wilson, Franklin D. Roosevelt, Eisenhower, Ford and Carter. *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 4, at 142; REVELEY, *supra* note 4, at 277-285; Putney, *supra* note 4, at 20, 23, 38; 2 ROBERT MCELROY, GROVER CLEVELAND: THE MAN AND THE STATESMAN 249-250 (1923). For example, former President and future Chief Justice William Howard Taft wrote that "the President may so use the army and navy as to involve the country in actual war and force a declaration of war by Congress. Such a use of the army and navy, however, is a usurpation of power on his part." William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 611 (1916). According to Winston Churchill, President Franklin D. Roosevelt stated that "'I may never declare war; I may make war. If I were to ask Congress to declare war they might argue

Constitution's drafting and help to inform our views of the Framers' understanding. Unfortunately, none of these questions is addressed at any length in Yoo's book. Such neglect is all the more glaring due to the stock that Yoo rightfully places in the views of the Framers. If the Framers did in fact intend to give the President the power to initiate offensive hostilities, as Yoo asserts, one can only conclude after reviewing postratification materials that upon implementation of the Constitution this understanding was promptly and utterly discarded.

Fourth, Yoo ignores important case law on the war power from the early years of the Constitution. *Bas v. Tingy*[51] and *Talbot v. Seeman*[52] were both decided within fifteen years of the Constitution's drafting. The former concluded that Congress could authorize either "perfect" war (through a declaration of war) or "imperfect" war (through an authorization). The latter decision, in an opinion authored by Chief Justice Marshall – a member of the Virginia ratifying convention in which Yoo rightly places much stock[53] – stated that:

> The *whole* powers of war being, by the constitution of the United States, vested in congress, the acts of that body can *alone* be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities . . . or partial hostilities . . . . To determine the real situation of America in regard to France, the acts of congress are to be inspected.[54]

Nowhere is this decision mentioned. To say the least, it is surprising that a book on the war power completely omits discussion of *Talbot*, which was

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about it for three months.'" EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 55 n.32 (1951). President Ford wrote that the President "could not initiate a war without the approval of both houses of Congress." Gerald R. Ford, *Foreword* to ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY vii (1991).

51. 4 U.S. (4 Dallas) 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."); *id.* at 45 (Paterson, J.) ("An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. . . . As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations.").

52. 5 U.S. (1 Cranch) 1, 28 (1801).

53. *See* YOO, *supra* note 5, at 131 ("[T]he views expressed in the Virginia convention have a weight greater than that of any other state convention.").

54. *Talbot*, 5 U.S. at 28 (emphases added).

decided during the formative years of the Constitution's development.[55] Yoo also overlooks subsequent judicial decisions that include passages that strongly reinforce Chief Justice Marshall's pronouncement.[56]

Fifth, the writings of many prominent early commentators are also ignored. James Kent asserted in 1795 – a mere six years after the Constitution took effect – that

> the constitutional policy of this country has wisely confided the exercise of [the] power [of making war] to the Legislature of the union . . . . It is essential however that some public act should announce to the people their new condition with regard to a foreign nation, *and authorize their aggressions.* . . . [W]ar can *only* be

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55. In fairness to Yoo, he notes that his "book concentrates less on judicial precedent and more on constitutional text, structure, and history." YOO, *supra* note 5, at 8. That said, simply casting aside contrary Supreme Court precedent seems more than a little cavalier in a book about constitutional law. After all, it is the job of the judiciary "to say what the law is." *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, Yoo shows little hesitation in using case law in other contexts. *See, e.g.,* YOO, *supra* note 5, at 189-190 (termination of treaties).

56. *See* Ex parte Quirin, 317 U.S. 1, 26 (1942) (the "Constitution thus invests the President as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war"); The Chinese Exclusion Case, 130 U.S. 581, 591 (1889) ("the secretary of state in his communication to the English government explained that the war-making power of the United States was not vested in the president, but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken"); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (the President "has no power to initiate or declare a war either against a foreign nation or a domestic State. . . . *He does not initiate the war* . . . .") (emphasis added); Fleming v. Page, 50 U.S. (9 How.) 603, 614-615 (1850) ("the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. . . . [T]his can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war."); New York Times Co. v. United States, 403 U.S. 713, 722 (1971) (Douglas, J., concurring) ("[T]he war power stems from a declaration of war. The Constitution by Art. I, §8, gives Congress, not the President, power '[t]o declare War.' Nowhere are presidential wars authorized."); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (stating through Supreme Court Justice and constitutional convention member William Paterson that "[t]here is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the *exclusive* province of congress to change a state of peace into a state of war.") (emphasis added).

Since publication of Yoo's book, the Supreme Court has shown no signs of retreating from these positions. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 592 n.21 (2006) (emphasis added) (relying on a passage from William Winthrop's treatise, *Military Law and Precedents* (1920), which states that "'in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution'") (emphasis in original).

> commenced by an act or resolution of congress which would have all the publicity of the most solemn declaration.[57]

Kent clearly viewed Congress alone as empowered to authorize hostilities. St. George Tucker, in his 1803 treatise on the Constitution, which has been called the "first extended, systematic commentary on the Constitution after it had been ratified by the people of the several states and amended by the Bill of Rights,"[58] reached a similar conclusion. He wrote: "The power of declaring war, with all its train of consequences, direct and indirect, forms the next branch of the powers confided to congress; and happy it is for the people of America that it is so vested."[59] He elaborated by observing that "[i]n England the right of making war is in the king. . . . With us the representatives of the people have the right to decide this important question, conjunctively with the supreme executive."[60]

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57. JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 66 (Fred B. Rothman & Co. 1991) (1795) (emphasis added); *see also* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 53 (1826) ("war cannot lawfully be commenced on the part of the United States, without an act of Congress"). Yoo does not hesitate to cite Kent's *Commentaries* elsewhere in his discussion. *See* YOO, *supra* note 5, at 53 (citing Kent for the proposition that early nineteenth-century scholars were aware that the Seven Years' War had been initially undertaken without a declaration of war).

58. Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES, at vii (Liberty Fund 1999) (1803).

59. *Id*. at 211.

60. *Id*. at 211-212. He conceded, however, that "in the practical exercise of the functions of the president of the United States, it may be found to be in the power of that magistrate to *provoke*, though not to *declare* war." *Id*. at 212 n.59 (emphasis in original).

Yoo suggests that it is largely scholarship dating from the Vietnam era and later that has advanced the theory that Congress must authorize offensive hostilities. *See* YOO, *supra* note 5, at 154 ("Much of the support for broadly interpreting the power to declare war arises out of concerns about unchecked presidential warmaking. This argument characterizes the writers on war powers during and immediately after the Vietnam War . . . as well as more recent authors. . . . Thus, they seek to convert declaring war, which specifically functioned under international law to determine the legal status of hostilities, into a domestic legal check on the executive branch.") (footnotes omitted).

To the contrary, as reflected above by Kent and Tucker, the notion that Congress has the authority to initiate hostilities did not originate in the 1960s, but has been the prevailing view from the time of the Constitution's implementation. *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 4, at 28 ("Until 1950, no judge, no President, no legislator, no commentator ever suggested that the President had legal authority to initiate war."). It is the view that the President enjoys unilateral authority to initiate major hostilities that is in fact the modern notion. *See, e.g.,* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 109, 111 (2d ed. 1829) ("The power of *declaring war*, with all its train of consequences, direct and indirect, forms the next branch of powers exclusively confided to congress. . . . [A] regular and formal war should never be entered into, without the united approbation of the whole legislature.") (emphasis in original); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1169 (1833) ("The power to declare war may be exercised by congress, not only by authorizing general hostilities . . . [but also] by partial hostilities . . . ."); WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 38-39 (1871) ("Congress has the sole power, under the constitution, to make that declaration, and to

A sixth concern in the context of the war power is that Yoo's argument appears to place too much emphasis on prevailing seventeenth- and eighteenth-century views of executive power, such as the writings of Locke, Montesquieu, and Blackstone. These scholars considered the executive power as they perceived it to be exercised by the English monarch.

A number of the Framers, however, were uncomfortable with comparisons between the war power of the U.S. President and that of the English monarch. James Wilson, not a shrinking violet when it came to executive power, stated that "[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."[61] Accordingly, in evaluating the powers of the presidency, one should be cautious in relying too heavily on the English model.[62] Certain

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sanction or authorize the commencement of *offensive* war.") (emphasis in original); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §443 (4th ed. 1879) ("It is sufficient to know that the people considered the act and state of war a matter of such transcendent importance and magnitude, involving such untold personal and material interests, hazarding the prosperity, and perhaps the very existence of the body politic, that they committed its formal inception to that department of the government which more immediately represents them, – the Congress."); HERMANN VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 164 (Alfred Bishop Mason transl., 1887) ("The right 'to declare war' belongs to congress alone (art. I., sec. 8, §11). Of course, the United States may get into a war without congress's having declared war. War is, in the first place, a state of fact, the appearance of which cannot be made wholly dependent, by any constitutional provisions whatever, upon the pleasure of one of the nations concerned. As far as that is possible, however, congress has the exclusive right of the initiative."); BERDAHL, *supra* note 2, at 58-59 ("Authorities agree that the power to begin an offensive war, or a war of aggression, rests in the United States only with Congress, and should properly be preceded by a declaration made by that body.").

61. 1 FARRAND, *supra* note 2, at 65-66; *see also* THE FEDERALIST No. 69 (Hamilton) 348, 349 (Garry Wills ed., 1982) ("the President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it."); Fleming v. Page, 50 U.S. (9 How.) 603, 618 (1850) ("[T]here is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."); *cf.* United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692D) (Marshall, C.J., on circuit) ("many points of difference . . . exist between the first magistrate in England and the first magistrate of the United States"); *Ex parte* Wells, 59 U.S. 307, 318 (1855) (McLean, J., dissenting) ("The executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign. Their respective powers are as different in their origin as in their exercise. A safer rule of construction will be found in the nature and principles of our own government.").

62. Yoo shows little hesitation in this regard. *See* YOO, *supra* note 5, at 113 ("in the realm of practical politics, the president's authority under the Constitution did not differ in important measure from that of the king"); *see also id*. at 63 (state constitutional "experiments in structural dilution were rejected in favor of a unitary president who retained the executive's

aspects of the English executive model were adopted whole cloth by the convention as they pertain to foreign affairs (for example, receiving ambassadors, commanding the military), some were modified to be shared with the Senate (for example, making treaties, appointing ambassadors and military officials), and some were granted outright to Congress (such as declaring war, issuing letters of marque and reprisal, raising and regulating the military).[63]

It seems odd to focus so extensively on inferences about what the Framers may have thought, based on what many of them read (Locke, Montesquieu, Blackstone), to the exclusion of a major portion of what the most prominent Framers actually wrote and did themselves.[64] Certainly many people disagree with a good portion of what they read, and there is no reason to think the Framers were any different. While discussing what the Framers read is useful, much greater emphasis should be placed on what they wrote and on what they actually did.

Seventh, there are also troubling inconsistencies in Yoo's argumentation. For example, despite his view that declarations of war are not the same as authorizations, and that actions such as the current Iraq War could be undertaken unilaterally by the President,[65] Yoo argues that "total war"[66] would

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traditional powers"); *id*. at 108 ("Customary executive power over foreign affairs had returned to a unitary, energetic executive, but one that took the form of a republican president rather than a hereditary monarch.").

63. *See, e.g*., Ramsey, *supra* note 35, at 1458-1459; *cf*. BLACKSTONE, *supra* note 31, at 249-251, 254; PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351 (Paul Leicester Ford ed., De Capo Press 1968) (quoting James Iredell: "It seems to have been wisely the aim of the late Convention, in forming a general government for America, to combine the acknowledged advantages of the British constitution with proper republican checks to guard as much as possible against abuses . . . .").

64. *Cf.* Ramsey, *supra* note 35, at 1453, 1473. This problem is particularly pronounced with respect to postratification materials.

65. *See* YOO, *supra* note 5, at 156-157 ("While [the 2002] authorizing statute demonstrated Congress's political support for the war, it was not truly necessary. If Congress had wanted to stop the invasion, it could have withheld appropriations.").

66. Yoo suggests that "full-blown total wars [are] characterized by mobilization of the economy and full deployment of the U.S. armed forces" and that they seek "total military and political victory." *See id*. at 162. Other reviewers have properly raised concerns about how Yoo's "total war" formulation fits in with the rest of his discussion. *See, e.g*., Bessette, *supra* note 2, at 22. Among them some have said that Yoo does not define "total war," *see* Sunstein, *supra* note 38, at 25; Ramsey, *supra* note 35, at 1465, but that criticism seems unfair.

Yoo contends that only in instances of congressionally-authorized, total war may certain civil liberties be infringed upon. *See* YOO, *supra* note 5, at 151-152. Yoo explains that "[d]eclarations are . . . important for domestic constitutional purposes. Textually, a declaration of war places the nation in a state of total war, which triggers enhanced powers on the part of the federal government. . . . Only a declaration of war from Congress could trigger and permit such extreme measures [such as internment] reserved only for total war." *Id*.

Yoo cites *Korematsu v. United States* in support of his argument. *Id*. at 151, 333. As Michael Ramsey has noted, *Korematsu* may stand for little today except perhaps as an example of wartime excess. *See* Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1692 n.28 (2002). Even if it does go beyond

require a declaration of war.[67] If declarations of war are not authorizations to use force but only diplomatic niceties, as Yoo would have the reader believe,[68] then why would a declaration of war provide legal authority for the President to conduct total war (as opposed to any other type of conflict)? Yoo himself argues that "[d]eclarations of war serve a purpose, albeit one that does not amount to the sole authority to initiate hostilities. Declarations do simply what they say they do: they declare."[69] Furthermore, from an originalist standpoint – an approach that Yoo appears to embrace[70] – there seems to be no reason for an exception for total war, as Yoo asserts,[71] since it is unlikely the concept as it is understood today was recognized at the time of the Constitution's framing.[72]

To take Yoo's logic a step further, if a declaration of war does not entail a congressional authorization of military hostilities,[73] and if the rest of Article I does not confer the authority to initiate war, as Yoo at times seems to contend,[74] that would leave the Vesting and Commander-in-Chief Clauses as the only remaining "war-authorizing" clauses in the Constitution. Such a construction would appear to provide the President with virtually exclusive

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that, *Korematsu* has little to do with the views of the Framers. *See id.* Yoo's reliance on the decision is therefore curious, since he devotes most of his attention in his war power discussion to the views of the Framers and otherwise eschews case law.

Moreover, at certain junctures, Yoo expands his characterization of declarations of war still further. He writes that "the Declare War . . . Clause[] assign[s] Congress an important role in determining the breadth and intensity of hostilities with another nation." *See* YOO, *supra* note 5, at 105. However, he provides no explanation how his hitherto narrow conception of the Framers' view of the Declare War Clause – encompassing mere courtesies under international law – becomes somehow translated into domestic constitutional authority permitting economic mobilization, full deployment of U.S. troops, and an expansion of the scope of warmaking. In this respect, Yoo seems to straddle the issue of whether declarations of war augment the power of the President.

67. *See, e.g.*, YOO, *supra* note 5, at 22.

68. *See, e.g.*, *id.* at 145 ("declaring war recognized a state of affairs – clarifying the legal status of the nation's relationship with another country – rather than authorized the creation of that state of affairs"); *see supra* notes 11, 18.

69. *See, e.g.,* YOO, *supra* note 5, at 151.

70. *See, e.g.*, *id.* at 9, 24-29.

71. *See, e.g.*, *id.* at 98 (constitutional convention delegate Elbridge Gerry "did not want the president to have the power to convert the entire nation's relations from peace to one of total, absolute war"); *id*. at 99 (stating that during the constitutional convention "Ellsworth and Mason may have supported the change to 'declare' war because it limited the executive's ability to plunge the nation into a total war"); *id*. at 100 (by changing "make" war to "declare" war, the convention "made clear that the president could not unilaterally take the nation into a total war"); *id*. at 104 (the Constitution "prevented the president from unilaterally igniting a total war"); *id*. at 120 ("the legislature as a whole could decide the question of total war"); *see also id*. at 22, 151, 159-160, 162.

72. *See* CORWIN, *supra* note 2, at 5-6 (concluding that the modern concept of total war did not exist before the French Revolution); *see also* Ramsey, *supra* note 35, at 1465.

73. *See, e.g*., *supra* notes 11, 18.

74. *See* YOO, *supra* note 5, at 294 (stating that Congress's Power of the Purse "renders unnecessary *any* formal process requirement for congressional authorization or a declaration of war before hostilities may begin.") (emphasis added).

authority to authorize hostilities. Under Yoo's formulation, why would Congress ever play *any* role in authorizing military operations? Congress's role in authorizing hostilities would seem to be wholly gratuitous. Under Yoo's theory, exercise of Article I war power would be akin to Congress authorizing the President to issue a pardon or veto legislation.

Finally, Yoo is guilty at times of loosely applying precedents regarding presidential warmaking.[75] With respect to precedents involving

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75. *See, e.g.*, YOO, *supra* note 5, at 12, 143, 294. In discussing presidential warmaking precedents, Yoo fails to make clear whether the asserted legality of these actions derives from unilateral executive authority or (at least in part) from subsequent, implied authorization from Congress (such as through appropriations acts). When Yoo discusses Congress's role in funding military operations that have not received explicit *ex ante* legislative authorization, he seems careful to avoid using the term "authorize" or "authorization." *See id.* at 10 (making reference to *ex post* congressional "approval through the power of funding"); *id*. at 159 ("Congress has never authorized the insertion of American troops, who remain in Kosovo to this day. Congress, however, agreed to provide supplementary appropriations for a long-term military presence in Kosovo . . . . Congress could have stopped the war . . . by *refusing* to appropriate the funds to keep the military operations going.") (emphasis in original); *id*. at 160 ("By not taking the step of placing conditions on their use, . . . Congress has implicitly allowed [troop] deployment. Indeed, by keeping the funds flowing once hostilities in Iraq, Afghanistan, and Kosovo had begun, Congress ratified the executive's exercise of initiative in war."); *see also id*. at 13, 22, 90, 104, 143, 294.

Yoo's consistent avoidance of the term "authorize" or "authorization" would seem to mean that he is referring to Congress's actions as providing mere political sanction to presidential warmaking and not legal authority. *See id.* at 159 ("[a]ffirmatively providing funding for a war, or at the very least refusing to cut off previous appropriations, represents a political determination by Congress that it will provide minimal support for a war").

In situations where the President is allegedly acting without express legislative authorization, some federal appellate courts have indicated that legal defects can be cured by subsequent implicit legislative action. *See, e.g.,* DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973) ("the Vietnamese war has been constitutionally authorized by the mutual participation of Congress and the President, we must recognize that those two coordinate branches of government – the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action – have taken a position that is not within our power, even if it were our wish, to alter by judicial decree."); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971) ("The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf Resolution . . . was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future 'to prevent further aggression.' Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill 'the substantial induction calls necessitated by the current Vietnam buildup.'") (footnotes omitted). For other authority, see Memorandum for the Attorney General from Randolph D. Moss, Assistant Attorney General, *Authorization for Continuing Hostilities in Kosovo*, Dec. 19, 2000, *available at* http://www.usdoj.gov/olc/final.htm; LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 46-47, 255, 382-383 (2d ed. 1996). *See generally* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116

the use of force, the scope and magnitude of the conflict need to be considered.[76] As Edward Corwin put it memorably more than half a century ago, precedents involving unilateral presidential war power have largely involved

> fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like. . . . Such episodes are small compared with Truman's claim of power to put an indefinite number of troops in Europe [as part of NATO] for an indefinite time in anticipation of war, without consulting Congress.[77]

(1947) (an appropriations act may "stand[] as confirmation and ratification of the action of the Chief Executive").

The appellate courts' reasoning in *DeCosta* and *Orlando* is consistent with the judiciary's less exacting standard for determining whether Congress has authorized certain presidential actions taken in the realm of foreign affairs. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 291 (1981) ("in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval"); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) ("where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims").

In sum, many of the instances of purported executive warmaking that Yoo relies on, such as Kosovo, may in fact reflect little more than constitutionally ambiguous presidential action legally ratified after the fact by Congress. If that is the case, then a major plank of Yoo's argument is weakened since he relies on past practice in large measure to support his vision of presidential unilateralism.

76. *Cf.*, Moore, *supra* note 2, at 814; Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 639 (1993) ("When American forces are committed to combat in substantial numbers, as in Korea, the risk of great physical sacrifice is real, and Security Council authorization cannot substitute for Congress's constitutionally granted power to 'declare war.'").

77. Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 15, 16; Mora v. McNamara, 389 U.S. 934, 936 (1967) (Douglas, J., dissenting from denial of a petition for a writ of certiorari) (quoting Under Secretary of State Nicholas Katzenbach: "'over a long period of time, . . . there have been many uses of the military forces of the United States for a variety of purposes without a congressional declaration of war. But it would be fair to say that most of these were relatively minor uses of force.'"); LAWRENCE R. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS 29 (1970) ("With the sole exception of the Korean war, the '125 instances' [of presidential war initiation] do not provide precedents for saying that the President has the power to fight a long-sustained and large-scale war on foreign shores, a war such as Vietnam, without a Congressional declaration of war."); *cf.* Raoul Berger, *War-Making by the President*, *reprinted in* 4 THE VIETNAM WAR AND INTERNATIONAL LAW 604, 635 n.204 (Richard A. Falk ed., 1976) (quoting Alexander Bickel's statement that "there comes a point when a difference of degree achieves the magnitude of a difference in kind"). A review of the individual presidential warmaking precedents confirms these views. *See, e.g.*, ROGERS, *supra* note 2, at 93-123.

Yoo nonetheless discusses Grenada, Panama, Somalia, and Kosovo in the same breath as major conflicts such as Vietnam.[78] The former instances were largely minor affairs and cannot be likened in scale and magnitude to anything like the major, congressionally authorized, international[79] engagements such as the War of 1812, the Mexican-American War, the Spanish-American War, World War I, World War II, Vietnam, the First Iraq War, the war in Afghanistan, and the Second (and current) Iraq War.

The Korean War is the sole exception to this pattern of major conflicts being undertaken only with *ex ante* congressional authorization.[80] Numerous scholars of wholly different persuasions have concluded that President Truman's actions on that occasion were constitutionally dubious.[81] Perhaps realization that the initial U.S. involvement in the Korean War was of doubtful legality accounts for presidents not having followed the Korean War model in subsequent major conflicts. Past practice may well have molded the

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78. *See* YOO, *supra* note 5, at 12; *see also id*. at 143, 162.

79. "International" engagements would exclude the American Civil War. In the Civil War, President Lincoln responded militarily against Confederate attacks against the Union outpost at Fort Sumter and later received retroactive sanction from Congress for this and other actions. *See* The Prize Cases, 67 U.S. (2 Black) 635, 670-671 (1863).

80. Even then, President Truman made informal overtures to the legislature for authorization and was counseled by senior members of Congress to proceed on his own. *See* Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the 'Imperial President' Myth*, 19 HARV. J. L. & PUB. POL'Y 533, 563-580 (1996).

81. *See, e.g.*, FISHER, *supra* note 31, at 87 (referring to "Truman's violation of constitutional and statutory requirements" in initiating U.S. involvement in the Korean War); TRIMBLE, *supra* note 3, at 230 ("Although the Korean war is cited as a precedent by the executive branch for a general presidential war-making power, it is the only major war that Congress did not authorize in advance. Its 'precedential' value seems limited given the unique political context in which it occurred."); WORMUTH & FIRMAGE, *supra* note 4, at 183 ("The first precedent for a presidential assertion of the power to initiate war is the Korean War. In that regard, it must simply be affirmed that violation by a President of a clear and exclusive textual grant of authority to Congress must not be taken to legitimate similar subsequent violations."); Stromseth, *supra* note 76, at 639 ("When American forces are committed to combat in substantial numbers, as in Korea, the risk of great physical sacrifice is real, and Security Council authorization cannot substitute for Congress's constitutionally granted power to 'declare war.'"); Robert F. Turner, *Congressional Limits on the Commander in Chief: the FAS Proposal*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?, at 37, 42 (Peter Raven-Hansen ed., 1987) ("Even during the Korean conflict – when in my view the President stretched (and may have exceeded) the proper limits of his authority . . . ."); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 135 (1973) ("Truman . . . dramatically and dangerously enlarged the power of future Presidents to take the nation into major war."); Moore, *supra* note 2, at 814 ("As to the suddenness of Korea, . . . I would argue that the president should have the authority to meet the attack as necessary but should immediately seek congressional authorization. In retrospect the decision not to obtain congressional authorization in the Korean War, in which the United States sustained more than 140,000 casualties seems a poor precedent."); VELVEL, *supra* note 77, at 31 ("it is more likely that, as claimed by many public figures at the time, the Korean war also involved an unconstitutional usurpation of Congress' power to declare war").

Constitution[82] to where the President can unilaterally involve the nation in relatively minor military actions (barring a congressional prohibition), but almost certainly that is not the case with respect to major hostilities.[83]

C. Conclusion

Despite the many shortcomings of Yoo's war power discussion, scholars of the "traditional" school should not permit themselves to become complacent. For those who believe that all or virtually all offensive uses of force abroad require *ex ante* congressional authorization, there remains a great gulf between practice and their view of the Constitution.[84] In this vein, traditionalists generally leave their readers with the somewhat unsettling and unsatisfying conclusion that a significant portion of minor, unilateral troop deployments abroad have been unlawful – this despite the fact that presidents and members of Congress swear to uphold the Constitution;[85] that the courts typically give some deference to executive branch interpretations of its own

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82. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 401 (1989) (citing Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 610 (Frankfurter, J., concurring) ("'traditional ways of conducting government . . . give meaning' to the Constitution."); *Steel Seizure*, 343 U.S. at 610-611 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II."); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("long-continued practice, known to and acquiesced in by Congress" establishes a presumption of lawfulness); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 135 (1938) ("Executive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution."); *cf.* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1961 paperback ed.) (1908) ("government . . . . is accountable to Darwin, not to Newton").

83. *Cf., e.g.*, HENKIN, *supra* note 75, at 100 ("Presidents have in fact deployed U.S. armed forces beyond U.S. borders hundreds of times without authorization or subsequent ratification by Congress . . . . what Congress can be said to have acquiesced in, was Presidential deployment of forces for purposes short of war.") (footnotes omitted). For instance, the Washington administration appears to have undertaken a handful of minor military expeditions without either a declaration of war or an explicit congressional authorization. Washington ordered an offensive military operation against the Wabash Indians with debatable prior congressional authorization. *See* SOFAER, *supra* note 43, at 122-123. As part of the military campaign against the Wabash, the Administration even authorized an attack against the British installation at Fort Miamis. *See id*. at 125-127. Again, the Administration did not have an express authorization from Congress (even though the action implicated the nation's relations with Great Britain). *See id*. at 126. That said, during the Washington administration, Congress did appear to authorize "[t]he important military actions" undertaken against Indian tribes. *Id*. at 119.

84. *See, e.g*., YOO, *supra* note 5, at 12.

85. *See* U.S. CONST. art. II, §1, cl. 8; *id*. at art. VI, cl. 3; Steel *Seizure*, 343 U.S. at 610 (Frankfurter, J., concurring).

powers;[86] that past practice is of no small importance in constitutional interpretation;[87] that the President, particularly in foreign affairs, may often take action when Congress has not prohibited it;[88] and that the judiciary has never definitively ruled that hostilities were illegal because they were undertaken without congressional authorization.[89]

To his credit, Yoo exposes the shortcomings of the traditionalist position and makes a valiant attempt to bridge the gap between theory and practice.[90] He goes to great effort to demonstrate that his vision of the war power in today's world comports with the original understanding of that power. He cannot, however, overcome the immense volume of evidence to the contrary. His war power discussion is at heart a normative one,[91] and it is not consistent with the views of the Framers. At the end of the day, with respect to the war power debate, Yoo appears to fall prey to the perils of revisionism. As Richard Pipes has written, "the trouble with revisionism is that it treats deviations and exceptions not as shadings of phenomena but as their essence."[92] Yoo seems to do just that, treating what should be regarded as insightful "shadings" of the war power debate (such as in his textual analysis) as the debate's "essence."

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86. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

87. *See, e.g.*, *supra* note 82.

88. *See, e.g.*, *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring); Haig v. Agee, 453 U.S. 280, 291 (1981); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

89. *See* Holtzman v. Schlesinger, 414 U.S. 1321 (1973), *overruling* 414 U.S. 1316 (1973) (Douglas, J.) (Justice Douglas's order would have halted the U.S. bombing campaign over Cambodia on the ground that war had not been declared against that country).

90. For an example of Yoo's attempt in this regard, see YOO, *supra* note 5, at 17. Yoo has been properly recognized for these efforts by at least one other reviewer. *See* Bessette, *supra* note 2, at 21, 23.

91. To be fair, Yoo at times acknowledges the normative elements of his book. *See, e.g.,* YOO, *supra* note 5, at ix (during the Cold War "a constitutional model that required the approval of multiple institutions before the United States could use force may have made some sense"); *id*. at x ("These new threats to American national security . . . should change the way we think about the relationship between the process and the substance of the warmaking system."); *id*. at 160-161 ("Recent conflicts . . . provoke questions that . . . . involve perhaps the most important issue facing the American public law system as it enters this century: how the Constitution will adapt to the globalization of political, economic, and security affairs.") (emphasis added). At others times, he labors to demonstrate that he is expounding the views of the Framers. *See, e.g.*, id. at 88-142.

92. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 257 (2003) (quoting Pipes).

II. THE TREATY POWER

Regarding treaties,[93] Yoo generally finds himself on firmer ground. On the whole, his four-pronged discussion of the treaty power is better reasoned and more supportable than his war power analysis, although he remains prone to overreaching. In the second part of his book, Yoo posits that: 1) unilateral treaty termination[94] by the President is constitutional; 2) executive branch treaty interpretation should trump informal Senate understandings at the time of advice and consent and (apparently) that treaty interpretation writ large should be solely a presidential matter; 3) international agreements entered into by the United States should be presumptively non-self-executing; and 4) treaties and congressional-executive agreements are not interchangeable forms of international agreements and should instead be categorized according to whether the agreement involves Congress's enumerated powers or concurrent legislative-executive powers.

A. Treaty Termination

In discussing treaty termination, Yoo is largely swimming with the tide of legal authority and recent practice rather than against it. Here again, he focuses much of his attention on constitutional text and structure, making a compelling argument in favor of the President's authority to terminate treaties on his own accord.

Article II, Section 2, Clause 2 of the Constitution provides the President with the authority to make treaties subject to Senate advice and consent.[95] The text of the Constitution, however, says nothing explicitly about the power to terminate treaties. Yoo advances five arguments to justify unilateral treaty termination. First, he argues that the very placement of the treaty power in Article II marks it as an executive power.[96] Thus, where the treaty power is concerned, Yoo argues persuasively that constitutional silence should be interpreted in favor of the President.[97]

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93. For purposes of this review, "treaties" are international agreements entered into under Article II, Section 2, Clause 2 of the Constitution with the advice and consent of the Senate. "Congressional-executive agreements" are international agreements that secure statutory authorization, either before or after the fact. A third type of international agreement, the "sole executive agreement" entered into on the President's own authority, is not the focus of Yoo's discussion and hence is largely outside the scope of this review.

94. For purposes of this review, "unilateral treaty termination" refers to the President's termination, without having received prior or subsequent authorization from Congress as a whole or from the Senate, of an Article II, Section 2 treaty that had received the advice and consent of the Senate (as opposed to a congressional-executive agreement or a sole executive agreement).

95. *See* U.S. CONST. art. II, §2, cl. 2.

96. *See* YOO, *supra* note 5, at 183.

97. *See id.* at 183-184; *see also* TRIMBLE, *supra* note 3, at 151.

Second, he argues the President can lawfully terminate treaties because the authority is implied in Article II's Vesting Clause (which, as noted earlier, is not burdened by language of limitation, as is Article I).[98]

Third, he contends that the constitutional symmetry between the Appointments Clause and the Treaty Clause supports the position that the President can unilaterally terminate treaties.[99] Both the appointment and the treaty powers are found in Article II, Section 2, Clause 2 of the Constitution, and each process requires the advice and consent of the Senate. In the case of the Appointments Clause, the Supreme Court has concluded that, while the President's power to appoint is subject to Senate advice and consent, removal of executive officials is not.[100] Yoo argues that the President's treaty-making power should be interpreted in similar fashion, resulting in the President having the authority to unilaterally terminate treaties even though he needs advice and consent to enter into them.[101]

Fourth, Yoo ably discusses how the exercise of power in the treaty realm is different from Article I lawmaking and, therefore, why parallel treatment of termination of treaties and repeal of statutes would be inappropriate.[102] Once Congress drafts and passes a bill and the President signs the legislation (or once Congress overcomes the President's veto), the bill automatically becomes law. The process with respect to treaties, however, is different. Even after the President has negotiated the treaty and the agreement has received Senate advice and consent, the President is under no obligation to ratify the treaty and thus give it legal effect.[103] He may choose to withhold ratification, an option Congress lacks in the domestic context after the President signs a bill into law.

Finally, Yoo contends that past practice, and tacit judicial acknowledgment of that practice, support the notion of unilateral treaty termination. The main pillar in this argument is *Goldwater v. Carter*,[104] which involved a challenge to the legality of President Carter's unilateral termination of the Taiwan Mutual Defense treaty. The Supreme Court ultimately directed that the case be dismissed, leaving the termination undisturbed, but it did not

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98. *See* YOO, *supra* note 5, at 183-184; *see also* Prakash & Ramsey, *supra* note 31, at 324-327; *supra* note 10 and accompanying text.

99. *See* YOO, *supra* note 5, at 184-187.

100. *See* Myers v. United States, 272 U.S. 52 (1926). *But cf.* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Congress may place limits on the President's power to remove a member of the Federal Trade Commission). For other decisions interpreting the President's removal power narrowly, see Wiener v. United States, 357 U.S. 349 (1958), and Morrison v. Olson, 487 U.S. 654 (1988).

101. *See* YOO, *supra* note 5, at 184-187.

102. *See id*. at 187-188.

103. *See id.*

104. 444 U.S. 996 (1979).

address the merits.[105] However, the Court of Appeals for the District of Columbia Circuit, often referred to as the second-highest court in the land, had earlier upheld President Carter's position on the merits in a per curiam decision, relying on a panoply of rationales, including several of those highlighted by Yoo.[106]

As Yoo rightly notes, other lower courts have also declined to preserve a legislative role in treaty termination in the absence of efforts by Congress on its own behalf. After the Supreme Court in *Goldwater* refused to overturn the termination of the defense treaty with Taiwan, a lower federal court in *Beacon Products Corp. v. Reagan*[107] let stand President Reagan's unilateral abrogation of the U.S. Treaty of Friendship, Commerce and Navigation with Nicaragua. A federal district court in *Kucinich v. Bush*[108] did the same with respect to President Bush's unilateral termination of the Anti-Ballistic Missile (ABM) treaty. These judicial non-decisions have essentially added a further gloss[109]

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105. *See id.* at 1002 (Rehnquist, J., for the plurality). While there was no majority opinion, seven of the nine justices either would have decided the issue on the merits in favor of the President or left the termination undisturbed as a practical matter. Justice Brennan would have upheld the President's decision on the merits. *See id*. at 1006 (Brennan, J., dissenting). Justices Rehnquist, Stewart and Stevens, along with Chief Justice Burger, concluded that the case presented a nonjusticiable political question. *See id*. at 1002 (Rehnquist, J., concurring). Justice Marshall, without elaboration, concurred in the result. *See id*. at 996 (Marshall, J., concurring in the result). Justice Powell would have dismissed the case for lack of ripeness. *See id*. (Powell, J., concurring). Justices White and Blackmun contended that the case should have been briefed and argued before the Court. *See id*. at 1006 (Blackmun, J., dissenting in part). None of the justices expressed the view that the President lacks authority to terminate treaties.

106. *See* Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (per curiam). It has been noted that vacated lower court decisions, if not reversed on the merits, may retain a degree of persuasive authority within that circuit. Accordingly, the D.C. Circuit opinion may enjoy some modest authority. *See* County of Los Angeles v. Davis, 440 U.S. 625, 646 n.10 (1970) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case . . . , the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the [circuit].") (citations omitted).

107. *See* 633 F. Supp. 1191 (D.C. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987) (Breyer, J.) (ruling the action involved a nonjusticiable political question).

108. *See* 236 F. Supp. 2d 1 (D.D.C. 2002) (ruling that the plaintiffs lacked standing and that the matter constituted a nonjusticiable political question).

109. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J. concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II.").

to historical practice.[110]

Yoo's argument might have been even more compelling had he devoted more attention to the galvanizing effect the dismissals of these cases have had on the law and practice of treaty termination. The period following *Goldwater v. Carter* reflects this phenomenon. Prior to *Goldwater*, the State Department Legal Adviser's office identified twenty-six treaties that had been terminated by the United States. Of these, the State Department claimed that thirteen had been carried out on the President's own authority.[111] While the Legal Adviser's office tabulated thirteen instances of unilateral termination in the first 190 years of the Constitution, it calculates that there have been no fewer than thirty-one unilateral terminations since.[112] While half of the pre-*Goldwater* treaty terminations were carried out pursuant to Senate or congressional authorization, *none* of the terminations executed since the decision has involved legislative approval.[113] In this respect, *Goldwater*, and

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110. Even in quarters not generally prone to support broad claims of executive power, there has developed a grudging recognition of the legitimizing effect these judicial non-decisions have had on unilateral treaty termination. Professor Adler, author of the only book devoted exclusively to the subject of treaty termination, states: "As a practical matter, the Court's action, or rather its inaction [in *Goldwater*], left the termination of the Mutual Defense Treaty intact. Although the plurality opinion in *Goldwater* did not establish a legal precedent, it will nonetheless establish a foundation, however shaky, for future unilateral presidential treaty terminations." *See* David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 38 (David Gray Adler & Larry N. George eds., 1996). Adler acknowledged at the time that the foundation was already being built upon. *Id.* at 53 n.93 (*Goldwater* "already has been invoked as authority in *Beacon Products v. Reagan*").

Professors Michael Glennon and Thomas Franck, two other authorities not apt to stake out overly pro-executive positions, have similarly conceded that the "Restatement and recent executive branch practice suggest that *Goldwater v. Carter* may now stand for the proposition that the President has the power to terminate or modify treaties unilaterally." THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 404 (2d ed. 1993).

Less surprisingly, the executive branch has come to rely upon these cases as well. Robert Dalton, long-time State Department Assistant Legal Adviser for Treaty Affairs, notes that "[a]lthough U.S. practice on termination of treaties prior to *Goldwater* had been mixed, since the decision in that case the consistent practice of the United States has been for the President to terminate treaties that have received Senate advice and consent on his own authority." Robert Dalton, *Treaties and Other International Agreements*, *in* NATIONAL SECURITY LAW 885, 899 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005). Similarly, Justice Brennan's dissent in *Goldwater* has been cited with approval by the Justice Department's Office of Legal Counsel. *See Constitutionality of Legislative Provision Regarding the ABM Treaty*, June 26, 1996, *available at* http://www.usdoj.gov/olc/abmjq.htm.

111. *Goldwater*, 617 F.2d at 716 n.20 (Wright, C.J., concurring).

112. U.S. State Department Memorandum, *Article II, Section 2 Treaties Terminated by the President Since 1980* (n.d.) (on file with the author).

113. *See id.* Professor Adler concludes that there had been fewer overall treaty terminations than the Legal Adviser's office calculated at the time of the *Goldwater* litigation, but the overall trend remains the same. Adler writes that prior to *Goldwater* there had been eighteen terminations, of which between six and nine had been unilateral terminations, while the remainder had been legislatively authorized. *See* DAVID GRAY ADLER, THE CONSTITUTION AND

to a lesser extent *Beacon Products Corp*. and *Kucinich*, have played a key role in adding further legitimacy to the preexisting political practice of unilateral treaty termination.[114] While, as a historical matter, treaties have been terminated by the President without congressional authorization, with bicameral authorization, and with Senate authorization,[115] recent practice reflects that Senate/congressional participation in this realm is fast falling into desuetude.

The weight of contemporary authority also supports Yoo's argument and acknowledges the President's power to terminate treaties on his own, a circumstance Yoo could have taken greater advantage of. For example, Yoo could have noted that the *Restatement* supports his position. It states that "[u]nder the law of the United States, the President has the power . . . to suspend or terminate an agreement in accordance with its terms."[116] He just as well might have noted that Professor Henkin, perhaps the preeminent authority in the field of foreign affairs law, concluded in his treatise that "[a]t the end of the twentieth century, it is apparently accepted that the President has authority under the Constitution to denounce or otherwise terminate a treaty, whether such action on behalf of the United States is permissible under international law or would put the United States in violation."[117] Yoo could also have added that even the Senate Foreign Relations Committee – probably the congressional body with the greatest stake in preserving the Senate's role in treaty termination – seems to accept grudgingly that the President can unilaterally terminate treaties: "Whether the President alone can terminate a treaty's domestic effect remains an open question. As a practical matter, however, the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to

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THE TERMINATION OF TREATIES 190 (1986).

114. The impact of *Goldwater* and *Beacon Products* on the legal analysis undertaken by opponents of the ABM treaty's termination is tacitly reflected in the statements of Senate leaders at the time. Senate Majority Leader Tom Daschle opposed President Bush's effort to terminate the agreement. Nonetheless, he conceded that the president had the authority to abrogate the treaty. *See Bush To Quit ABM Treaty Thursday*, *available at* http://archives.cnn.com/2001/ALLPOLITICS/12/12/rec.bush.abm.treaty/ ("Daschle said although it is his understanding Bush has the authority to unilaterally pull out of the treaty, he is researching what 'specific legal options Congress has' to stop it. He admitted such options may be limited."). Senator Joseph Biden, Chairman of the Senate Foreign Relations Committee, was similarly opposed to the treaty's termination, but also resigned to President Bush's abrogation of the agreement. When asked about the possibility of litigating the matter, he stated that "quite frankly, I don't think that's a winning argument . . . he is in all probability able to pull out of the treaty." Barry Schweid, *Bush Plans ABM Treaty Withdrawal*, *available at* http://www.eng.yabloko.ru/Publ/2001/Agency/ap-121201.html.

115. *See, e.g.,* ADLER, *supra* note 113, at 190.

116. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §339 (1987).

117. HENKIN, *supra* note 75, at 214.

whether a treaty is still in effect."[118]

On the whole, these criticisms of Yoo's treaty termination subsection are mere quibbles. While the notion of unilateral treaty termination still raises hackles in some legal circles,[119] Yoo's position is more convincing and is likely to be increasingly reinforced by political branch practice for the foreseeable future.

B. Treaty Interpretation

At first blush, broad presidential power over treaty interpretation would seem to be relatively uncontroversial. The Supreme Court itself has noted that "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[120] The *Restatement* echoes this view.[121] There are also practical considerations that weigh in favor of deference to the President in this area. Were the Senate, Congress as whole, or the courts to overturn presidential treaty interpretations without due regard for executive branch views, the United States could find itself in the unenviable position of trying to comply with competing treaty interpretations – one domestic and one international.[122]

As noted above, Article II, Section 2 provides the President with the power to make treaties subject to Senate advice and consent. As a practical matter, the President has come to control the lion's share of the treaty

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118. COMMITTEE ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. Prt. 106-71, 2d Sess. 201 (2001) (citations omitted).

119. *See, e.g.,* John Dean, *The Termination Debate: Can President Bush End the ABM Treaty Without Congressional Approval?* Aug. 31, 2001, at http://writ.news.findlaw.com/dean/20010831.html; Bruce Ackerman, *Bush Can't Operate as a One-Man Band*, *available at* http://www.wagingpeace.org/articles/2002/01/00_ackerman_one-man-band.htm.

120. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185 (1982); *see* Sanchez-Llamas v. Oregon, 548 U.S. 331, 355 (2006) ("'[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight'") (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *see also* United States v. Stuart, 489 U.S. 353, 369 (1989). None of these cases is cited in Yoo's book. For discussion of judicial treatment of executive branch treaty interpretations, see Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007).

121. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §326 (1987) ("(1) The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states. (2) Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States, but will give great weight to an interpretation made by the Executive Branch.").

122. *See, e.g.*, JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW 12, 59 (2001).

power,[123] save the consent function and any lawful condition[124] the Senate places on its consent.[125] The President alone has the authority to negotiate treaties (the Senate's advice being informal and precatory);[126] the President by and large decides whether to submit an agreement as an Article II, Section 2 treaty or as a congressional-executive agreement;[127] the President alone has the discretion whether to ratify an agreement following congressional participation;[128] and the President enjoys authority to unilaterally terminate treaties.[129] Therefore, it presumably should not be surprising that the President enjoys fairly wide latitude in interpreting treaties.

Nonetheless, broad assertions of presidential authority to interpret treaties can often prove highly controversial. The President and the Senate have locked horns over interpretation/reinterpretation and executive branch treaty interpretations affecting private parties often end up in federal court. An example of the former occurred in the 1980s when members of the Senate vigorously challenged the Reagan administration's reinterpretation of the

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123. *See, e.g.*, TRIMBLE, *supra* note 3, at 151 ("Rather than thinking of treaties as an odd form of domestic statute, it is more compelling to view them as an instrument of foreign policy, and to view treaty termination as one facet of the spectrum of activities conducted in the life of a treaty, ranging from negotiation through interpretation and supervision, all of which are within the domain of the executive branch.").

124. Some Senate conditions may prove unlawful although the Supreme Court has yet to rule on this issue. *See* Power Authority v. Federal Power Commission, 247 F.2d 538 (D.C. Cir. 1957) (invalidating a Senate condition), *vacated as moot sub nom.* American Pub. Power Ass'n v. Power Authority, 355 U.S. 64 (1957).

125. *See, e.g.*, Haver v. Yaker, 76 U.S. 32, 35 (1869) ("In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration."); The Diamond Rings, 183 U.S. 176, 183 (1901) (Brown, J., concurring) ("The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty.").

The Senate has used conditions to protect (or extend) its prerogatives, including interpretation. For example, the "Biden condition," which was placed on the Intermediate-Range Nuclear Forces (INF) Treaty in 1987, sought to lock in the treaty's interpretation to what it had been at the time of Senate advice and consent. *See, e.g.,* Dalton, *supra* note 110, at 896. Nor was the INF treaty the last agreement to carry such a condition. *See id*. at 897.

126. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (the President "alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it.").

127. *See, e.g.*, TRIMBLE, *supra* note 3, at 111, 113-114. *But cf. infra* notes 224-225 and accompanying text (discussing the Senate's effort to ensure that certain agreements only be submitted as treaties).

128. *See, e.g.*, Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir. 1979) (en banc); TRIMBLE, *supra* note 3, at 111.

129. *See supra* Part II.A.

ABM Treaty.[130] *Hamdan v. Rumsfeld*[131] reflects the latter situation. This case makes clear that judicial deference to the executive branch in this realm is far from absolute. In *Hamdan*, the Supreme Court rejected the President's interpretation of Common Article 3 of the Third Geneva Convention. In so doing, the Court neither expressed nor demonstrated any deference to the President's interpretation.[132]

Just how much authority does the President enjoy with respect to treaty interpretation? On this point, Yoo sends conflicting signals. The bulk of his discussion centers around the tension between the executive branch's authority to interpret treaties and the informal interpretative understandings reached as a result of executive branch representations made to the Senate at the time of advice and consent.[133] Yoo asserts that in such circumstances the executive branch's subsequent views should control, and on this point he is not unpersuasive.

In arguing that executive branch representations and informal Senate understandings should give way to subsequent executive branch interpretations,[134] Yoo puts forth several arguments. He contends that the Vesting Clause provides authority to the President to control most aspects of

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130. *See, e.g.*, JOHN NORTON MOORE, THE NATIONAL LAW OF TREATY IMPLEMENTATION v-vi (2001).

131. 548 U.S. 557 (2006) (rejecting the President's interpretation that Common Article 3 of the Third Geneva Convention does not apply to terrorist detainees housed at Guantanamo Bay). For other decisions rejecting executive branch treaty interpretations, see, e.g., Johnson v. Browne, 205 U.S. 309, 318-320 (1907) ("The claim is now made on the part of the Government that 'the manifest scope and object of the treaty' of 1842 are altered and enlarged by the treaty or convention of July 12, 1889. . . . We do not concur in this view."). Even in decisions where the judiciary professes deference to the executive branch's interpretation, it has emphasized that "courts interpret treaties for themselves." Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

Nor does judicial deference to executive branch treaty interpretation always appear to have been the norm. *See* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 499 (2007) (reviewing the first fifty years of Supreme Court treaty law jurisprudence and concluding that the U.S. government won less than twenty percent of the cases).

132. The Court's failure even to mention its traditional deference to executive branch treaty interpretation was noted by Justice Thomas in dissent. *See Hamdan*, 548 U.S. at 719 (Thomas, J., dissenting) ("the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.").

133. *See* YOO, *supra* note 5, at 192, 197.

134. Yoo seems to concede that the Senate may be able to affect interpretation through formal reservations, understandings, and the like, when they are included in the Senate's resolution of advice and consent, as opposed to "understandings" in the colloquial sense. *See id*. at 192 ("To give the Senate's understandings of the treaty independent force, especially when the Senate does not directly express those understandings in the treaty text through reservations, allows one party to the treatymaking process to avoid the supermajoritarian hurdles imposed by the Treaty Clause.").

the treaty process and that treaty interpretation should be no different.[135] Yoo also notes sensibly that since the courts grant deference to the executive branch in its interpretation of ambiguous statutory authority,[136] *a fortiori* the courts should give deference to executive branch interpretations of treaties, an area where the executive branch enjoys greater constitutional authority and is a "draftsman" of the text. In addition, Yoo posits that the President's claim to broad authority in this realm is buttressed by past practice,[137] functional considerations (such as the executive branch's day-to-day handling of foreign affairs),[138] and analogies drawn from debates over federal common law[139] and legislative history.[140]

Yoo is not unconvincing, but he does overlook potential counter-arguments. At a certain level, executive branch reinterpretation of a treaty can cause the treaty to become a fundamentally different instrument from that to which the Senate gave its advice and consent, thus severely undermining the Senate's constitutional role.[141] When does executive authority over interpretation/reinterpretation collide with the Senate's prerogatives? Some discussion of this concern would seem warranted. Moreover, acknowledgment of past, formal Senate involvement in treaty interpretation would have added balance to Yoo's discussion, which implies that the Senate's efforts to participate in treaty interpretation are of a recent vintage. Such participation dates back to the early days of the Constitution. For example, in 1791, at what seems to have been the request of President Washington, the Senate reviewed and ultimately declined to accept France's interpretation of its Treaty of Amity and Commerce with the United States.[142] More recently, the Senate has formally reasserted its power over treaty interpretation through the recurring "Biden condition."[143]

While Yoo's argument in the context of informal Senate understandings is not without its merits, when the time comes to make generalizations about treaty interpretation writ large (including the role of the courts and Congress as a whole), Yoo overreaches. For instance, he concludes broadly that "the president enjoys the final constitutional authority on the interpretation of

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135. *See id.* at 191-192; *see also* TRIMBLE, *supra* note 3, at 140-141. *See generally* Prakash & Ramsey, *supra* note 31.

136. *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 865-866 (1984).

137. *See* YOO, *supra* note 5, at 198-204.

138. *See id*. at 192.

139. *See id*. at 193-194.

140. *See id*. at 195-198. A discussion of *Rainbow Navigation v. Department of the Navy* might have been in order as well. This D.C. Circuit decision generally supports Yoo's position regarding the nonbinding nature of informal Senate understandings, but was not discussed in his book. *See* 911 F.2d 797 (D.C. Cir. 1990), *cert. denied*, 499 U.S. 906 (1991).

141. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL CONFLICTS 248 (4th ed. 1997).

142. *See* 2 ANNALS of CONG. 1771 (1791); SOFAER, *supra* note 43, at 100 (providing background on the interpretation).

143. *See supra* note 125.

treaties."[144] In this respect, Yoo seems to advocate for a scope of presidential authority so generous that it leaves out the other two branches entirely.[145]

Yoo's implicit discounting of a congressional role in treaty interpretation is unfortunate. On a number of occasions, Congress has essentially provided its own treaty interpretation by statute.[146] In fact, in an effort to remedy the fallout from the *Hamdan* decision, the executive branch actually had to *request* that Congress essentially reinterpret the treaty by statute.[147] In some situations, such as the Military Commissions Act, Congress has elected to use

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144. YOO, *supra* note 5, at 210 (discussing the ABM treaty); *see also id*. at 190-191 ("treaty interpretation is so tied up in the setting of foreign policy that the power has come to rest with the executive branch"); *id*. at 191-192 ("As a foreign affairs power . . . the structure of the Constitution's allocation of the executive power and Article II's Vesting Clause would reserve [treaty interpretation] to the president."); *id*. at 213 ("the Constitution vests treaty interpretation authority in the president"); *id*. at 208 ("The president's formal role as the maker of treaties and his function in conducting our international relations vest the executive with the power to interpret treaties."); *cf. id*. at 209 ("accepting the president's unilateral authority to interpret treaties"); *id*. at 201 ("President Washington and his cabinet unanimously assumed that interpretation of the 1778 French treaties rested solely within presidential authority"); *id*. at 202 ("Washington and the leading figures of his administration proceeded on the assumption that it was the exclusive province of the executive branch to interpret treaties on behalf of the United States"). *But cf. id*. at 191 ("the president should have the *leading* role in treaty interpretation") (emphasis added); *id*. at 207 (asking "which branch of the federal government has *primary* authority to determine whether the United States would continue to comply with the agreement.") (emphasis added).

A more calibrated form of deference would be preferable. *See* Michael Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1298-1302 (2002) (arguing that executive branch interpretation of treaties involving commercial law and private law should warrant less deference than agreements that involve more traditional foreign affairs and defense matters, where the President enjoys greater constitutional authority).

Yoo does concede, however, that Congress as a practical matter has the authority to frustrate implementation of executive branch treaty interpretations. *See* YOO, *supra* note 5, at 204, 209.

145. *See* YOO, *supra* note 5, at 208 ("this function [of filling in gaps in treaties] would properly rest with the president when, in the domestic statutory context, it normally would fall to the federal courts"); *id*. at 198 ("If we were to accept the Eskridge and Frickey model [of statutory interpretation], it seems clear that the function of interpreting treaties would fall on the president rather than the judges."); *id*. at 193 ("international relations will call on the president rather than the courts to adapt the text to new circumstances"); *cf. id*. at 193 (stating that the president in his role interpreting treaties "does not suffer from the problems of legitimacy that beset the federal courts in their role of making common law").

146. *See, e.g.*, Military Commissions Act of 2006, Pub. L. 109-366, §6, 120 Stat. 2600, 2632-2635 (interpreting U.S. obligations under Common Article 3 of the Third Geneva Convention); 22 U.S.C. §3751(c) ("The President shall not accede to any interpretation of paragraph 1 of Article IX of the Panama Canal Treaty of 1977 which would permit the Republic of Panama to tax retroactively organizations and businesses operating, and citizens of the United States living, in the Canal Zone before the effective date of this Act."); see also U.S. Department of Justice Memorandum, *Examples of Congress Clarifying Vague Treaty Terms by Statute* (n.d.) (on file with the author).

147. *See* Draft Military Commissions Act of 2006, Draft Legislation submitted to Congress by the Administration, §6 (n.d.) (on file with author).

a statute to clarify ambiguity through the last-in-time rule,[148] effectively imposing an interpretation on the executive branch. Thus, Congress undeniably plays a role in treaty interpretation.

Excluding the courts, as Yoo would also appear inclined to do,[149] is even more dubious, particularly in light of *Hamdan*.[150] Longstanding practice reflects that deference has not always been accorded to the President in the treaty interpretation realm. Unlike treaty termination and other areas of foreign affairs law, courts, as noted earlier, have not hesitated to interpret treaties on the merits and to rule against the executive branch.[151] To the extent that Yoo is arguing the courts have no role at all, he would also seem to be flying in the face of explicit constitutional text. Article III, Section 2, of course, provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made" under the authority of the United States.[152] The little stock Yoo appears to place in the judiciary in the field of treaty interpretation would seem to be reflected in his failure to cite case law in his discussion.[153]

Yoo's subsection on treaty interpretation is often thought provoking, such as in its discussion of the parallels between treaty interpretation and legislative history, but ultimately it is unclear exactly what he is advocating. If he is arguing only that informal Senate understandings at the time of advice and consent should not be dispositive, he may well be correct. If, as the overall tenor of this subsection suggests, he is advocating that the Senate, Congress as a whole, and the courts give absolute deference to the executive branch in treaty interpretation, his position is very much out of step with constitutional text, practice, and jurisprudence.

C. Self-executing Versus Non-self-executing Treaties

The question of which international agreements require implementing legislation in order to be judicially enforceable (non-self-executing treaties) and which ones do not (self-executing treaties) has long been a murky issue.[154] The traditional rule regarding whether international agreements are self-

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148. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control").

149. *See supra* notes 144-145. This omission has prompted criticism from other quarters as well. *See, e.g.*, David J. Bederman, Book Review, 100 AM. J. INT'L L. 490, 495 (2006) (reviewing *The Powers of War and Peace*).

150. *See* 548 U.S. 557 (2006).

151. *See, e.g.*, *Hamdan*, 548 U.S. at 557; Sloss, *supra* note 131, at 499.

152. U.S. CONST. art. III, §2, cl. 1.

153. Yoo states that "the Supreme Court currently gives deference to the president's reading of treaties," but there is no supporting citation. *See* YOO, *supra* note 5, at 207.

154. *See, e.g.*, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

executing or not is that the intent of the parties governs.[155] If the United States agrees "to perform a particular act,"[156] then Congress typically must implement the treaty through legislation. Treaties implicating certain congressional powers may also require implementing legislation in order to be legally binding within the United States.[157] An example would include international agreements implicating the appropriations power.[158] Finally, treaties are thought to be non-self-executing if the Senate attaches a condition to its resolution of advice and consent asserting that the agreement requires implementing legislation.[159]

Yoo suggests raising the bar, however, making agreements presumptively require implementing legislation.[160] In this respect, Yoo's advocacy in the service of greater executive flexibility would appear to come to a jarring halt.[161] Yoo would require the President to make two trips to Capitol Hill to implement a typical treaty: first, to get a two-thirds vote in the Senate to enable him to ratify the agreement; and second, to secure majorities in both houses to enact the required implementing legislation.

On purely policy grounds, Yoo's argument may well be warranted. There are good reasons for requiring Congress as a whole to implement treaties prior to their enjoying domestic effect, not the least of which is that including the House helps to democratize the treatymaking process.[162] Yoo, however, would collapse this policy view into constitutional law. Moreover, the rule he puts forward is suspect, especially given his desire to adhere to constitutional text and the views of the Framers.

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155. *See, e.g.*, Medellin v. Texas, 128 S. Ct. 1346, 1366 (2008) ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4)(a) (1987).

156. Foster v. Neilson, 27 U.S. 253, 314 (1829).

157. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4)(c) (1987). *But cf.* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 775-781 (1988).

158. *See* Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) ("[T]he expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is indispensable."); Turner v. American Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C. Mich. 1852) ("money cannot be appropriated by the treaty-making power").

159. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) ("although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4)(b) (1987).

160. *See, e.g.*, YOO, *supra* note 5, at 225, 244, 248, 270, 281. Others have argued for a presumption in favor of self-execution. *See, e.g.*, Vázquez, *supra* note 154, at 709.

161. It could be argued, of course, that by ensuring no judicial enforceability of treaties, the executive branch's freedom of action in the international sphere would be bolstered. *See, e.g.*, YOO, *supra* note 5, at 249.

162. *Id.* at 257-258.

That is not to say that Yoo's legal discussion is without merit. He rightly points out, for example, the structural inconsistency of having certain Article I, Section 8 powers generally require implementing legislation (such as appropriations) but not others (such as the commerce power); this is a distinction with little basis in constitutional text.[163] But, saying that Yoo's argument is plausible is not to say it is the most reasonable interpretation of the Constitution. Yoo's rule presumptively making treaties non-self-executing would seem to automatically read the House into the treaty process, an outcome with a thin textual basis and one that the Framers clearly rejected.

On a broader level, Yoo is troubled by self-executing treaties since he believes they have the potential to transcend federalism limitations by permitting the President and the Senate to interfere with exclusive state functions. He also fears that treaties may be used to make law in apparent conflict with Article I's exclusive grant of lawmaking authority to Congress.[164] Yoo contends that "[r]equiring Congress to implement treaties would prevent . . . a limitless power . . . [to legislate via the treaty process]."[165]

Thus, a major part of Yoo's focus is basically the *Missouri v. Holland*[166] problem. In that decision, the Supreme Court indicated that the President and the Senate through the treaty power may be able to undertake activities in a domestic context that the Congress could not due to then-existing limitations on Article I powers. Long overlooked due to the Court's permissive attitude toward congressional authority since the 1930s, this question has arisen again, now that some modest limits have been recently placed upon Congress by the Supreme Court.[167]

In attempting to resolve his concerns about federalism and Article I, Yoo puts forward two proposals. First, he argues that treaties involving Congress's Article I powers must be non-self-executing.[168] Second, he contends that treaties addressing matters left to the states, and hence outside Article I, could in fact be self-executing.[169] Oddly, Yoo's formulation does not seem to solve one of the main problems he sets out to address. As noted above, one of Yoo's concerns is that the treaty power has the potential to swallow up the prerogatives of the states, since the President and Senate can do that which

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163. *See, e.g.*, *id.* at 219-220.

164. *See, e.g.*, *id.* at 217.

165. *Id.* at 223.

166. 252 U.S. 416 (1920). *Missouri v. Holland* has been criticized in the academic literature, *see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005), but it apparently remains good law. *See* United States v. Lara, 541 U.S. 193, 201 (2004) ("as Justice Holmes pointed out [in *Missouri v. Holland*], treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal'").

167. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); *see also* Rosenkranz, *supra* note 166, at 1936.

168. *See, e.g.*, YOO, *supra* note 5, at 232.

169. *See id.* Apparently, Yoo would not mandate that treaties involving subject matter outside of Article I be self-executing; they could still be accompanied by legislation.

Congress as a whole cannot. His proposed solution does not necessarily protect exclusive state domains, however, since they still could be invaded through self-executing treaties.[170] As Carlos Vázquez has written, "[n]ational power would remain precisely as broad under his theory."[171] In a sense, under Yoo's approach, exclusive state prerogatives would actually be procedurally more vulnerable than Article I functions, since the latter would be protected by requiring *both* a two-thirds vote in the Senate *and* subsequent majority votes in each house of Congress, the former defended "only" by the two-thirds vote requirement in the Senate (legislation under these circumstances being only optional under Yoo's proposed rule).

Such a concern is the least of Yoo's obstacles, however. The key constitutional passage on this question is found in Article VI, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all* Treaties made, or which shall be made, under the Authority of the United States, *shall* be the supreme Law of the Land . . . ."[172] Constitutional text, therefore, gives little hint of a distinction in status among treaties,[173] much less Yoo's formulation. The plain language of the document strongly implies that upon ratification treaties simply take their place alongside regularly enacted statutes. Presumptively requiring agreements to be subsequently implemented by legislation, particularly after satisfaction of the extraordinary two-thirds requirements of Article II, Section 2, does not seem like the better rendering of constitutional text.

Furthermore, just how treaties can be the "Law of the Land" but at the same time be presumptively without domestic legal effect, as Yoo would have the reader believe, poses a difficult hurdle for him to overcome.[174] Upon enactment, the implementing legislation would make the treaty the law of the land, not the treaty itself as Article VI would seem to require.[175] The question is why would treaties have been included in Article VI if they would lack domestic effect without legislation?[176]

Moreover, reviewing the language of Articles II and III suggests an additional difficulty with Yoo's position. Article II, Section 2, Clause 2 states

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170. *See* Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2211 (1999).

171. *Id.*

172. U.S. CONST. art. VI, cl. 2 (emphases added).

173. *See, e.g.*, Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT'L SECURITY L. & POL'Y 89, 104 (2005) ("Article VI states that '*all* treaties . . . shall be the supreme Law of the Land,' not that 'treaties . . . shall be the supreme law *if Congress adopts implementing legislation*.'") (emphasis in original); Vázquez, *supra* note 170, at 2213-2214; Paust, *supra* note 157, at 766..

174. Alexander Hamilton observed that requiring legislative implementation of treaties would make international agreements "essentially nugatory." *See The Defence* No. 37, January 6, 1796, *in* 20 THE PAPERS OF ALEXANDER HAMILTON 13, 18 (Harold C. Syrett ed., 1974).

175. *See* YOO, *supra* note 5, at 96; *see also* Halberstam, *supra* note 173, at 104.

176. *See, e.g.*, Halberstam, *supra* note 173, at 104.

that the President shall "*make* Treaties" subject to Senate advice and consent.[177] Article III provides that the "judicial Power shall extend to all Cases" arising under "Treaties *made*" under the authority of the United States.[178] The text leaves no indication of an intervening period or status between when the President "makes" a treaty and when it has been "made" for Article III purposes. The logical interpretation of the two clauses taken together is that after the President "make[s]" a treaty (following advice and consent), it has been "made" and is then subject to the jurisdiction of the federal courts.[179] Particularly for a committed textualist such as Yoo,[180] insistence on the distinction between self-executing and non-self-executing treaties – let alone a presumption in favor of non-self-executing treaties – seems puzzling.

Yoo's approach would also seem contrary to the views of the Framers.[181] The Framers were greatly troubled by the lack of enforceability of treaties under the Articles of Confederation.[182] The failure of the national government to ensure compliance with its treaty commitments in turn permitted American treaty partners to flout their own obligations to the United States[183] and this played no small role in encouraging the effort to produce a new national charter.[184]

During the constitutional convention, the issue of enforceability of treaties arose more than once. Gouverneur Morris proposed an amendment to a draft of the Constitution that tells a great deal about the views of the convention regarding this issue. The draft at the time explicitly granted Congress the power to "enforce treaties."[185] Morris moved "to strike . . . 'enforce treaties'

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177. *See* U.S. CONST. art. II, §2, cl. 2 (emphasis added).

178. *See id*. at art. III, §2, cl. 1 (emphasis added).

179. *See* Vázquez, *supra* note 170, at 2169-2170.

180. *See, e.g.,* YOO, *supra* note 5, at 144-152.

181. *See, e.g.,* THE FEDERALIST No. 64 (Jay) 328 (Garry Wills ed. 1982) ("Some are displeased . . . because as the treaties when made are to have the force of laws, they should be made only by men invested with legislative authority . . . . All constitutional acts of power, whether in the executive or in the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature . . . . It surely does not follow that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected."); *see also* Paust, *supra* note 157, at 760-766.

182. *See, e.g*., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as 'Supreme Law of the Land*, 99 COLUM. L. REV. 2095, 2118-2120 (1999); *see also* Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, *in* 5 NEW AMERICAN NATION 327, 358 (Peter S. Onuf ed., 1991) ("the framers were virtually of one mind when it came to giving treaties the status of law. . . . The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.").

183. *See, e.g*., Flaherty, *supra* note 182, at 2118.

184. *See, e.g.*, *id*. at 2118-2120.

185. 2 FARRAND, *supra* note 2, at 389 n.9.

as being superfluous since treaties were to be 'laws' . . . ."[186] Morris's amendment passed without a dissenting vote, which appears to indicate there was broad acceptance among the drafters of the Constitution that treaties would in fact be self-executing under what would become the Supremacy Clause.[187]

Because of this apparent understanding that treaties would be self-executing, Morris later attempted to ensure the participation of the House of Representatives in the treaty-making process. He moved that "'no Treaty shall be binding on the U.S. which is not ratified by a law.'"[188] James Madison opposed this effort noting "the inconvenience of requiring a legal *ratification* of treaties of alliance for the purposes of war."[189] Morris's effort was ultimately not supported by the convention. A comparable failed attempt was undertaken by James Wilson. He contended that treaties "are to have the operation of laws, they ought to have the sanction of laws also."[190] Wilson's effort was defeated handily.[191] From their statements, both Morris and Wilson appear to have believed that, because treaties were to be the law of the land, the sanction of the House would have been prudent.[192] The defeat of their

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186. *Id*. at 389-390 (emphasis added); *see also* Flaherty, *supra* note 182, at 2123-2124.

187. *See, e.g*., Flaherty, *supra* note 182, at 2124 n.131. Debate at the time of the ratification conventions also provides support (albeit not uniform support) for the notion that the Framers expected treaties to be self-executing. *See* THE FEDERALIST No. 22 (Hamilton) 109 (Garry Wills ed., 1982) ("A circumstance, which crowns the defects of the confederation, remains yet to be mentioned – the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."); George Mason, *Objections to the Constitution of Government Formed by the Convention* (Oct. 7, 1787), *quoted in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 881, 883 (E. H. Scott ed., 1898) ("By declaring all treaties supreme laws of the land, the executive and the Senate have, in many Cases, an exclusive power of legislation, which might have been avoided, by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety."); *cf.* THE FEDERALIST No. 69 (Hamilton) 351-352 (Garry Wills ed., 1982). *But cf*. THE FEDERALIST No. 75 (Hamilton) 380 (Garry Wills ed., 1982). For an attempt to synthesize the views expressed in *The Federalist* on this issue, see Flaherty, *supra* note 182, at 2134-2141.

188. 2 FARRAND, *supra* note 2, at 392; *see President Washington: Message to House of Representatives on Jay's Treaty*, Mar. 30, 1796, *reprinted in* 3 FARRAND, *supra* note 2, at 371 ("the power of making Treaties is exclusively vested in the President, by and with the advice and consent of the Senate . . . and . . . every Treaty so made, and promulgated, thenceforward becomes the law of the land. . . . [During the constitutional convention] a proposition was made, 'that no Treaty should be binding on the United States which was not ratified by a law,' and that proposition was explicitly rejected. As, therefore, it is perfectly clear to my understanding, that the assent of the House of Representatives is not necessary to the validity of a Treaty; . . .") (Farrand's footnotes omitted); Flaherty, *supra* note 182, at 2123-2124.

189. 2 FARRAND, *supra* note 2, at 392.

190. *Id*. at 538; *see* Flaherty, *supra* note 182, at 2124.

191. *See* 2 FARRAND, *supra* note 2, at 538.

192. *See* Flaherty, *supra* note 182, at 2124.

efforts indicates that the convention rejected an automatic, formal role for the House in implementing treaties, a rule akin to the one Yoo advances.[193]

To the extent that constitutional text and the views of the Framers are fairly clear, the Supreme Court's 1829 opinion in *Foster v. Neilson*[194] and its progeny have complicated matters. Out of this opinion, authored by Chief Justice Marshall, the distinction between self-executing and non-self-executing treaties in American law was born, a dichotomy that has developed over time and exists to the present day. *Foster*, however, is thought to be the only decision where the Supreme Court has clearly refused to grant relief because a treaty lacked the required legislative implementation.[195] Moreover, in the years since *Foster*, the Supreme Court has not shied away from interpreting treaties as being self-executing.[196]

Furthermore, traditional rules of treaty/statutory construction such as the "last in time" rule counsel against Yoo's position that most treaties should be

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193. Moreover, many of the references from the Framers that Yoo uses to buttress his argument do not bear the weight he places upon them. Under Yoo's proposed rule, treaties would be presumptively non-self executing. Many of the authorities from the 1780s and 1790s that Yoo relies upon say a good deal less. During the ratification debates, Madison wrote that the House "will *sometimes* demand particular legislative sanction and co-operation." YOO, *supra* note 5, at 127 (quoting *The Federalist* No. 53) (emphasis added); *see* Flaherty, *supra* note 182, at 2139. Yoo quotes Madison, at another juncture, that "the sentiments of this body [the House] cannot fail to have very great weight, *even when the body itself may have no constitutional authority*." *Id*. at 136 (emphasis added). For a discussion of Madison's views on the subject during the ratification debates, see Flaherty, *supra* note 182, at 2139-2149.

194. 27 U.S. (2 Pet.) 253, 314 (1829) (concluding that a treaty is to "be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision"), *overruled in part by* United States v. Percheman, 32 U.S. (17 Pet.) 51 (1833); *see* Paust, *supra* note 157, at 766-767. Prior to *Foster v. Neilson*, the Supreme Court had interpreted treaties to be self-executing. *See, e.g*., United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress"). *See generally* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344 (1809); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Paust, *supra* note 157, at 764-767.

195. *See* Vázquez, *supra* note 170, at 2194. *See generally* Medellin v. Texas, 128 S. Ct. 1346 (2008).

196. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("[T]he [Warsaw] Convention is a self-executing treaty. . . . [N]o domestic legislation is required to give the Convention the force of law in the United States."); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (the treaty in question "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts"); Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 272-273 (1909) ("A treaty . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."). *But see* Cameron Septic Tank Co. v. City of Knoxville, 227 U.S. 39, 50 (1913) (treaty provision considered not-self-executing); Robertson v. General Electric, 32 F.2d 495, 500 (4th Cir. 1929) ("the section is not self-executing and no legislation has been enacted to carry it into effect"); Paust, *supra* note 157, at 772-773.

presumptively non-self-executing.[197] If treaties are presumptively non-self-executing, why would there even be a need for a rule governing conflict between treaty law and domestic legislation? Under Yoo's formulation there would seem to be only conflict between competing statutes.

Finally, the question remains, if treaties presumptively require implementing legislation, why would the Senate bother attaching declarations to certain treaties asserting that they are non-self-executing?[198] For instance, the Senate has taken to the practice of attaching such declarations to its resolutions of advice and consent to human rights treaties.[199] This would seem to be a gratuitous exercise if Yoo's rule is in fact the law of the land.[200]

In many ways, reconciling the practice of non-self-executing treaties and constitutional text resembles squaring a circle. Yoo provides a novel and plausible approach to resolve this dilemma. He offers a theory to try to bring Congress's Article I, Section 8 powers into alignment with the requirements of the Treaty Clause, an effort that may be attractive from a policy standpoint. That said, the legal rule that Yoo advances has difficulty overcoming several hurdles – textual, structural, historical, and jurisprudential. As a result, within his four-pronged discussion of the treaty power, the segment on self-executing versus non-self-executing treaties may be the least persuasive.

D. The Interchangeability v. Exclusivity Debate over Treaties

The final segment of Yoo's book discusses the relationship between treaties and congressional-executive agreements. Here, Yoo wades into the debate over which international agreements should be used when.

As Yoo notes, generally there are two schools of thought regarding the two major types of international agreements under U.S. law (Article II, Section 2 treaties and congressional-executive agreements). One group of scholars – the Interchangeability camp[201] – argues that the two types of international agreements are coextensive in scope – anything that can be done by treaty can be done by congressional-executive agreement and vice versa. This position, which has gotten the better of the argument over the years, draws some support from Article I, Section 10 of the Constitution, which tacitly acknowledges the existence of non-treaty international agreements: "No State shall, without the Consent of Congress, lay any Duty of Tonnage,

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197. *See, e.g.*, Vázquez, *supra* note 170, at 2189-2190. Yoo seems to accept the legitimacy of the "last in time" rule even though the rule's existence runs largely counter to his argument. *See* YOO, *supra* note 5, at 209.

198. *See* Vázquez, *supra* note 170, at 2214-2215.

199. *See, e.g.*, *id*. at 2186.

200. *See id*. at 2214-2215.

201. *See, e.g.*, Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I & II*, 54 YALE L.J. 181, 534 (1945); HENKIN, *supra* note 75, at 217; BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995).

keep Troops, or Ships of War in time of Peace, enter into any *Agreement or Compact* with another State, or with a foreign Power . . . ."[202] Interchangeability draws additional textual support from Congress's enumerated powers such as its authority over foreign commerce, the power to declare war, the authority to raise and support armies, and the Necessary and Proper Clause.[203] Thus, Interchangeability permits Congress as a whole to participate in the making of international agreements.[204] This school of thought is further buttressed by Supreme Court decisions such as *Field v. Clark*,[205] *B. Altman & Co., v. United States*,[206] and *Wilson v. Girard*,[207] which have tacitly recognized the validity of congressional-executive agreements. Finally, widespread use of congressional-executive agreements dating from the 1790s further reinforces the legitimacy of such measures.[208]

The other group – the Exclusivity camp[209] – essentially believes that international agreements negotiated by the President that require subsequent approval must be submitted to the Senate for advice and consent, not to Congress as a whole. This group draws support from a strict reading of the Treaty Clause, which provides for no other express means of entering into international agreements.[210] It is also reinforced by the structural argument that, unlike a treaty which may not be put into force domestically without presidential approval, a congressional-executive agreement can go into effect domestically by overturning the President's veto.[211]

Yoo rightly takes both camps to task. Among his arguments against the Interchangeability School are that congressional-executive agreements are not provided for in the constitutional text[212] and that their termination by the President may intrude on Congress's domestic lawmaking/repealing function.[213] Yoo also takes issue with the construction of Article I, Section 10 that supports use of congressional-executive agreements – an interpretation that would permit a prohibition against the states to be transformed into an authorization for the federal government to undertake the very same activity.[214] Returning to his *Missouri v. Holland* concerns, Yoo also contends that Interchangeability would permit statutes in a congressional-executive

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202. U.S. CONST. art. I, §10, cl. 3 (emphasis added).
203. *See* ACKERMAN & GOLOVE, *supra* note 201, at 11.
204. *See* YOO, *supra* note 5, at 274-275.
205. *See* 143 U.S. 649 (1892).
206. *See* 224 U.S. 583 (1912).
207. *See* 354 U.S. 524, 527-529 (1957).
208. *See supra* notes 45, 82.
209. *See, e.g.*, Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Edwin Borchard, *Treaties and Executive Agreements – A Reply*, 54 YALE L.J. 616 (1945).
210. *See* YOO, *supra* note 5, at 264-270.
211. *See id*. at 266-267; *see also* Tribe, *supra* note 209, at 1252-1258.
212. *See* YOO, *supra* note 5, at 253-254.
213. *See, e.g*., *id*. at 271.
214. *See id*. at 253-254

agreement context to transcend their usual bounds under Article I, Section 8.[215] Further, while practice demonstrates widespread use of congressional-executive agreements, it does not support complete interchangeability.[216] Finally, Yoo (unconvincingly) points out the shortcomings of relying on earlier judicial opinions on the subject[217] and on the historical practice of congressional-executive agreements.[218]

Similarly, Yoo criticizes the Exclusivity School. He argues that this position misses the mark for a number of reasons. One is because, as a practical matter, the approach would invalidate about 90 percent of American international agreements since World War II.[219] Moreover, the Exclusivity position overlooks important structural considerations including the awkwardness prompted by self-executing treaties governing areas that are the province of Congress as a whole (e.g., international commerce).[220] Finally, Yoo notes that it is difficult to argue against the constitutionality of *ex post* congressional-executive agreements, as the Exclusivity Camp does, when the Supreme Court has repeatedly upheld sole executive agreements, which do not involve any congressional participation at all, and which therefore seem the more dramatic departure from the Treaty Clause.[221]

The courts have provided little definitive guidance on this question, generally preferring to let the political branches work out their own accommodations.[222] Authorities such as Phillip Trimble note that the

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215. *See id*. at 252, 271-274. Of course, Yoo's presumption in favor of the non-self-execution of treaties would still seem to permit statutes to transcend Article I, Section 8, although they would be allowed to do so only after the treaty in question has entered into force. *Cf*. Vázquez, *supra* note 170, at 2213.

216. *See id*. at 253, 284-290; *infra* notes 222-226 and accompanying text.

217. Yoo discusses the aforementioned *Field v. Clark* and *B. Altman & Co., v. United States* decisions. These cases likely provide at least implicit support for congressional-executive agreements. Other such cases, such as *Von Cotzhausen v. Nazro*, 107 U.S. 215, 217 (1883), *Wilson v. Girard*, 354 U.S. 524, 527-29 (1957), and *Weinberger v. Rossi*, 456 U.S. 25, 30-31 (1982), also tacitly reinforce the practice. Still other decisions have left congressional-executive agreements intact for reasons of standing and justiciability. *See infra* note 222. These decisions might also have warranted some mention in Yoo's book.

218. *See* YOO, *supra* note 5, at 256-257. Yoo's historical discussion in this respect is overly brisk.

219. *See id*. at 269.

220. *See id*.

221. *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942); *see also* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 980-981 (2001).

222. *See* Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001), *cert. denied*, United States Steelworkers of America v. United States, 534 U.S. 1039 (2001) (ruling that the decision whether an international agreement should be a treaty or a congressional-executive agreement is a nonjusticiable political question); Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258 (D.C. Cir. 1980) (concluding that the plaintiffs challenging the congressional-executive agreement lacked standing); Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977) (ruling that the decision to submit a proposed international agreement as a treaty or executive agreement is nonjusticiable); *cf*. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978) (ruling that the Panama Canal could

executive branch and Congress have in fact established a general pattern by which certain types of agreements are used under certain circumstances.[223] An example of this political practice occurred during consideration of the Conventional Forces in Europe Flank Agreement (CFE). In providing its advice and consent to ratification of the CFE, the Senate added a condition insisting that certain "militarily significant" international agreements be submitted only as Article II, Section 2 treaties.[224] The President ratified the treaty and accepted this condition.[225]

State Department Circular No. 175 reinforces the notion that the form international agreements take is not capricious. It states that

> [i]n determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to . . . [among other factors] past U.S. practice as to similar agreements . . . [and] [t]he preference of the Congress as to a particular type of agreement . . . . the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole.[226]

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be transferred under the Treaty Clause as well as through congressional-executive agreement pursuant to the Property Clause of Article IV); *but see* Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000) (upholding the constitutionality of a congressional-executive agreement on the merits).

223. *See* TRIMBLE, *supra* note 3, at 129 ("[i]n the past international agreements dealing with boundaries, war and peace, arms control, military alliances, human rights, extradition, diplomatic and consular privileges, immigration, intellectual property, taxation, the environment, and commerce have almost always been submitted to the Senate as Article II, Section 2 treaties. Most, but not all, agreements to join international organizations have been concluded pursuant to Article II . . . . international agreements dealing with trade, finance, energy, fisheries, and bilateral aviation relations have normally been concluded as congressional-executive agreements."); Dalton, *supra* note 110, at 892 ("A review of practice shows that international agreements dealing with defense, extradition, tax, disarmament, the environment, and private international law tend to be concluded as treaties. . . . With the exception of the SALT I Interim Agreement . . . presidents have submitted arms control treaties to the Senate.").

224. *See* Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT'L L. 55, 56 (1998).

225. *See id*.

226. *Considerations for Selecting Among Constitutionally Authorized Procedures*, 11 U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL §723.3, *available at* http://www.state.gov/documents/organization/88317.pdf. The State Department does not seem to have adopted the position of full interchangeability. *See, e.g.*, ELBERT M. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES: THEIR SEPARATE ROLES AND LIMITATIONS 158-60 (1960) ("on informal or semi-formal occasions the statement is made by State Department officials that the Congressional-Executive agreement cannot be as extensive as a treaty as to subject matter, that the treaty can extend to subjects reserved to the states whereas a Congressional-Executive agreement may not. . . . there is the implicit admission in the State Department's official Circular that treaties and Congressional-Executive agreements are *not* wholly interchangeable") (citations omitted); *Great Lakes-St. Lawrence Basin: Hearings on S. 1385 Before a Subcomm. of the Senate Comm. on Commerce*, 78th Cong., 2d Sess. 307 (1944)

In this debate, Yoo wisely avoids either pole. He argues that congressional-executive agreements should be used primarily in instances involving exclusive congressional authority under Article I, Section 8, such as international commerce, criminal matters, patent/copyright issues, and appropriations.[227] If the subject matter involves concurrent presidential/congressional authority such as arms control, defense, human rights, or environmental treaties, Yoo contends the agreement should be a treaty.[228]

To be sure, Yoo's overlay of theory onto practice is not seamless. It is highly debatable, for example, that the President shares authority with the Congress over environmental matters.[229] This would seem largely a congressional or state preserve. Withal, those seeking a much more intellectually pristine theory than Yoo's may be disappointed, as they may have text or practice on their side but they are unlikely to have a full measure of both.[230] Thus, Yoo's theory largely seems to conform with current practice

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[hereinafter *Great Lakes Hearings*] (quoting a State Department memorandum: "In short there are *many* international undertakings which may be entered into either by the treaty method or by agreements implemented by legislation of the Congress.") (emphasis added); *Department of State Assistant Legal Adviser's Reply to Second Memorandum of Senate Office of Legislative Counsel Concerning Certain Middle Agreements* [sic] (Feb. 5, 1976), *reprinted in* 122 Cong. Rec. 3374 (1976) [hereinafter *Legal Adviser's Reply*] ("the Legal Adviser does not maintain that the President has unlimited discretion in choosing between treaties and executive agreements, either as a matter of law or of practice. . . . the absence of a precise rule of law delimiting what agreements must be submitted as treaties and which may be concluded as executive agreements, does not give the President total discretion in the matter. . . . We agree [that] . . . '[t]here are a number of areas where you have to go the treaty route. . . . if certain subject matters have to be dealt with by treaty, there is no option in the Executive to deal with those by executive agreement.'"); *see also Great Lakes Hearings*, *supra*, at 15, 17, 93 (quoting the State Department Legal Adviser as conceding that congressional-executive agreements could not transcend Congress's enumerated powers as was done by treaty in *Missouri v. Holland*).

227. *See* YOO, *supra* note 5, at 273-274.

228. *See id*. at 290; *see also id*. at 273-274. For a critique of Yoo's approach, see Spiro, *supra* note 221, at 1006-1007. For another approach to the relationship between Article II, Section 2 treaties and congressional-executive agreements, see generally *id.*

229. Tax treaties are another area that do not fit well with Yoo's model. *See* Spiro, *supra* note 221, at 1006-1007.

230. For example, Professor Tribe argues that agreements involving the limitation of federal or state sovereignty and the subjecting of American citizens or governmental organs to the jurisdiction of an international entity warrants a treaty and not a congressional-executive agreement. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 651-652 (3d ed. 2000). As Yoo rightly points out, this is not an overly useful typology since *every* international agreement involves the sacrifice of some degree of U.S. sovereignty. *See* YOO, *supra* note 5, at 266-267. The latter half of Tribe's formulation regarding the subjecting of citizens and government organs to international entities is similarly problematic as it does not seem to comport with past practice (e.g., U.S. entry into the World Trade Organization which was carried out via congressional-executive agreement).

It has also been maintained that significant agreements require the dignity of a treaty. *See, e.g., Legal Adviser's Reply*, *supra* note 226, at 3375. A cursory review of past practice again contradicts this rule. NAFTA and GATT were both enacted by congressional-executive

and makes for a rough but sensible formulation.

Much as with his treaty termination subsection, Yoo's discussion of Interchangeability versus Exclusivity is well argued. Much as with his discussion of war power and self-executing versus non-self-executing treaties, Yoo attempts to reconcile theory with practice. In this instance, Yoo makes a game effort to resolve a vexing constitutional question and contributes to an improved and more refined understanding of the relationship between congressional-executive agreements and treaties. Even though his formulation is imperfect, he deserves credit for getting past the sterility of the Interchangeability versus Exclusivity debate, and thus widening the scope of discourse.

E. Conclusion

Overall, Yoo's treaty discussion is more persuasive than his war power section. His examination of treaty termination is particularly convincing. Similarly, his formulation for bridging the gap between treaties and congressional-executive agreements has much to recommend itself. On the other hand, Yoo's discussion of treaty interpretation is somewhat ambiguous. To the extent he is arguing that executive branch treaty interpretations should prevail over informal Senate understandings at the time of advice and consent, he may well be correct. However, the tenor of his discussion points toward the position that the executive branch's treaty interpretations ought to be granted absolute deference by the Senate, Congress as a whole, and the courts. Such an approach cannot withstand scrutiny. Similarly, Yoo's argument in favor of making treaties presumptively non-self-executing faces too many textual, structural, historical, and jurisprudential obstacles.

CONCLUSION

Yoo's iconoclastic book is important for shaking the dust off of complacent notions about war and treaty powers under the Constitution. Yoo's arguments are novel, insightful, and generally well-argued. Moreover, the emphasis Yoo places on constitutional text,[231] history, and the views of the Framers is laudable.[232] Accordingly, *The Powers of War and Peace* cannot easily be ignored.

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agreement; the agreement ending U.S. involvement in the Vietnam War was carried out by sole executive agreement. It is difficult to maintain that these agreements were in any way insignificant.

231. *See, e.g.*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-492 (1939) (Frankfurter, J., concurring) ("the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it").

232. At least two other reviewers have also rightly acknowledged Yoo's contributions in these areas. *See* Ramsey, *supra* note 35, at 1457; Bessette, *supra* note 2.

However, with regard to the war power, Yoo's book is much more a normative vision of how the author believes the Constitution should operate than an objective disquisition on the views of the Framers and the state of the law governing the use of force.[233] Yoo's vision of the war power is just that – his vision. Yoo might have been better off openly stating his normative vision at the outset and setting out to support it on various legal and functional grounds, rather than engaging in tortuous efforts to establish that his vision was shared by the Framers. While he includes a discussion of the views of the Framers, which delves deeply into the ratification debates, Yoo omits key evidence as to their understanding of the Constitution, such as vital postratification writings and early warmaking practice. Among other problems, he ignores judicial precedent and authoritative opinion from the Constitution's formative years[234] and misapplies presidential warmaking precedents. There are promising aspects of Yoo's war power analysis that hint toward resolving the gulf between constitutional theory and practice as to the use of force, but the true implication of his argument – that the President may commence major hostilities on his own accord – would constitute a marked departure from constitutional theory and practice.

By and large, Yoo fares better with respect to treaties. His argument that the President enjoys unilateral power to terminate treaties draws a healthy measure of support from both legal authority and practice. Yoo's position that congressional-executive agreements ought to be used for measures involving Congress's enumerated powers, while areas of concurrent executive-legislative authority should be carried out as treaties, reflects an important attempt to find middle ground between the seemingly irreconcilable Interchangeability and Exclusivity camps.

Yoo's subsection on treaty interpretation is somewhat perplexing. At times, he seems only to be asserting that executive branch treaty interpretation ought to prevail over informal Senate understandings at the time of advice and consent. At other junctures, he seems to be asserting that the executive branch's interpretation of treaties deserves not just some deference but absolute adherence. The former position is highly plausible; the latter, however, does not comport with constitutional text, the views of the Framers, past practice, or judicial opinion.

With respect to Yoo's discussion of the relationship between self-executing and non-self-executing treaties, Yoo is again in full revisionist mode. His argument that treaties ought to be presumptively non-self-executing offers some advantages, such as trying to bridge the gap between the requirements of the Treaty Clause and the exercise of Congress's enumerated powers. However, his argument cannot overcome the daunting hurdles before it.

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233. *See, e.g.*, YOO, *supra* note 5, at ix-xi.

234. In fairness to Yoo, he is hardly the first person in the debate over presidential powers to omit or ignore contrary evidence.

In the end, Yoo's book is an important work about the limits of executive power. Many will find much to disagree with in it, and readers venturing into this area for the first time should be wary, but those in the field who are not afraid of having their assumptions vigorously challenged will not go unrewarded.