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Executive Muscle by Peter Berkowitz

A review of *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* by John Yoo. University of Chicago Press. 366 pp. \$29.00.

CRITICS have vilified John Yoo, professor of law at the University of California at Berkeley, as the foremost scholarly apologist for the Bush administration's broad claims of executive power --- to use military force, to detain enemy combatants, to interrogate them using harsh coercive methods and "render" or transfer them to third countries which are known to use torture, and to collect intelligence --- in waging the global War on Terror.

In fact, Yoo, who from 2001 to 2003 served as deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice, is a formidable legal scholar, whose new book provides reason to believe that the administration's broad understanding of the constitutional allocation of war powers is supported by constitutional text, history and structure.

This is not to suggest that Yoo's account is free from problems or that the Bush administration, in defending America since 9/11, has always made correct choices. Indeed, the Bush administration has consistently, and in some cases recklessly, pushed the outside of the legal envelope.

It is to suggest that the charges flung at the administration of Caesarism or fascism, to which numerous law professors have lent their prestige, themselves betray culpable ignorance of the substantial arguments about executive power and the Constitution that inform the Bush's administration's conduct of national security.

The conventional academic wisdom holds that in matters relating to war and peace Congress and the President are co-equal branches; that the Constitution establishes a strict, legalistic process for sending American military forces into battle, involving a formal declaration of war by Congress; and that it is the duty of the federal courts to ensure that in the conduct of foreign affairs the executive and the legislature maintain the constitutionally mandated balance.

In contrast, Yoo finds a clear and systematic distinction in the Constitution between the grant of power to the executive to conduct foreign affairs, and the grant of power to Congress to enact domestic legislation and to allocate funds for all government activities, foreign as well

as domestic.

The foreign affairs power is essentially executive, Yoo observes, because war and diplomacy require the energy, swiftness, secrecy and flexibility characteristic of executive power. He also argues that this understanding accords with the political thought of the thinkers --- Locke, Montesquieu, and Blackstone --- whom the framers regarded as their intellectual authorities.

Yoo's approach yields several important conclusions. Congress's constitutional power to declare war is not an indispensable prerequisite to the use of military force, but rather signals, in the event of full scale war, the establishment of specific legal relations under international law. Notwithstanding the Senate's advice and consent role in making them, the president has principal responsibility for interpreting treaties and deciding whether to honor or terminate them. And congressional-executive agreements, which allow Congress and the president to use ordinary legislation to bind the U.S. to agreements with other nations, are, for the limited purpose of regulating international commerce, a constitutionally sound alternative to treaties.

Yoo emphasizes that the Constitution does not leave Congress without means to push back. The power to enact domestic legislation --- including for the regulation of the military and the implementation of treaties --- and the power to appropriate funds --- including to staff and buy weapons for the armed forces --- provides Congress with flexible and effective means for restraining presidential war powers.

But won't Congress find it difficult to refuse to support the troops once the executive has initiated hostilities? Answer: A lack of courage, principle or political will on the part of members of Congress should not be confused with an absence of legislative means under the Constitution to check and balance executive power.

So John Yoo has joined issue --- openly, vigorously, learnedly --- with the academic legal establishment on the great issues of the day. By clarifying the theory of government on which the current administration relies in waging war and pursuing peace, he has rendered a genuine service to all, on both sides of the aisle, who wish to uphold the Constitution and defend the nation.

Peter Berkowitz teaches at George Mason University School of Law and is the Tad and Dianne Taube senior fellow at Stanford's Hoover Institution.

*This is a corrected version.