
BOOK REVIEWS

Crisis and Command: A History of Executive Power from George Washington to George W. Bush

By JOHN YOO

*Reviewed by John C. Eastman**

How do so-called “great” Presidents interpret and use their constitutional powers differently from average Presidents in times of emergency? What limits does the Constitution place on executive power when crises threaten our national security and the constitutional order? What are the respective roles of Congress and the courts in checking the President’s actions when he attempts to resolve these crises with his Article II powers?

These are a few of the questions Professor John Yoo, in his recent book *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*, confronts as he traces, from President to President, the evolution of presidential power in the United States. The book is partly an episodic history of the response of Presidents to various crises, partly a compelling constitutional argument for an expansive interpretation of executive power, and entirely a very readable, enjoyable, and well-argued volume. Yoo argues that the Presidents who have been considered “great,” most notably George Washington, Abraham Lincoln, and Franklin D. Roosevelt, have interpreted their Article II powers broadly to resolve emergencies successfully during their tenure. He writes, “All these Presidents believed that their office was equal, and not subordinate, to Congress or the courts and took for granted that the broad exercise of that authority was essential to their success.”

As the title of the book suggests, “crisis” has been key to a President’s greatness: for instance, Yoo notes Teddy Roosevelt’s observation that “[i]f Lincoln had lived in times of peace, no one would have known his name now.” But more important is the President’s response to the exigency. Some rise to the challenge, as did Lincoln when he averted the breakup of the Union using his Commander in Chief powers, often without the prior consent of Congress. Others “withdr[aw] feebly into their shells,” as did James Buchanan when he determined that, though secession of the southern states was illegal, he had no constitutional power to prevent their exit. Beyond using these Presidents’ responses to crises as a measuring stick for greatness, Yoo also writes that such emergencies produce conflicts among the branches that more clearly reveal the extent of each branch’s power: “It is only during times of high stress on the political system when the principles of the constitutional framework clearly emerge.”

*Dr. John C. Eastman, Professor and former Dean at Chapman University School of Law, is Chairman of the Federalist Society’s Separation of Powers Practice Group [and a candidate for California Attorney General].

In short, Yoo’s discussion of executive power is hardly an academic exercise focused on understanding the original meaning of or intent behind the Constitution’s Article II, which, among other things, vests in the President “[t]he executive Power,” bestows upon him the title of “Commander in Chief,” and binds him to “take Care that the Laws be faithfully executed.” These broad and ambiguous terms set out in the text of the Constitution tell us little about the Framers’ expectations of what exactly the President would become (and this is precisely why the Framers chose them), though, as Yoo points out, the Framers would hardly have intended the President to become a tool of the legislature, considering their experience under the executive-by-committee system set out by the Articles of Confederation.

Instead, the Framers favored a more flexible approach to executive power: it would not be meticulously recorded and preserved for all time within the text of the Constitution like a mosquito trapped in amber; it would be interpreted by the people who held the office as they encountered non-theoretical problems and emergencies. On the opposite side of the coin, Congress and, to a lesser extent, the courts would define the President’s power by allowing its expansion and limiting it when they felt the President overstepped his bounds. Yoo is persuasive in focusing on the practice of the political branches in defining the President’s power: given the broad terms laid out in the Constitution, we would expect the political branches, through their checks on each other, to define their meaning over time, especially during times of conflict.

Yoo spends most of *Crisis and Command* chronicling the most important episodes of the presidencies of some of the “great” Presidents: Washington, Thomas Jefferson, Andrew Jackson, Lincoln, and FDR. His discussion of each President is not comprehensive, as he readily admits at the beginning of the book. However, the purpose of the history is not to grade each President on his full performance while in office; rather, it is to evaluate each President’s use of his power during our nation’s most pressing emergencies, including the Whiskey Rebellion, the nullification crisis, and the Great Depression. During each of these episodes, the President succeeds by using his Article II powers, independent of Congress, to bring the emergency to a favorable conclusion. He may cooperate with Congress, but he does not let Congress drag him toward its own idea of a successful resolution. For instance, Yoo recounts that Congress passed four different Neutrality Acts before the United States entered World War II, but FDR, interpreting the language of the Acts loosely and even possibly contravening them, sold and leased equipment to Great Britain to prevent what FDR would have considered the national security disaster of losing Europe to the Axis powers. On the other hand, James Madison, whose presidency is not highly regarded, recognized America’s unpreparedness for war but took no active steps to prevent the war-minded Congress from leading the nation into the War of 1812, in which Washington, D.C. was conquered and burned and the United States nearly defeated.

* John Yoo’s *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* is published by Kaplan Publishing.

The underlying argument behind Yoo's portrayal of presidential power during these incidents is that the President acts best when he recognizes that his office is an independent entity and not merely a tool of congressional whim. It is, of course, not always true that the unilateral use of power by the President leads to good results. Congress impeached Andrew Johnson in part because he refused to follow a law preventing him from removing members of his Administration, and to some degree because he refused to cooperate with Congress' efforts during Reconstruction. Richard Nixon was forced to resign to avoid impeachment when he claimed executive privilege in response to the Senate Watergate Committee and a special prosecutor's subpoenas for Oval Office recordings, and later when gaps were discovered on the tapes he did turn over. Yoo prudently recognizes these failed uses of executive authority and, in the case of the Watergate scandal, argues that Congress' response was mistakenly to attempt to constrain the powers of the executive through such measures as the War Powers Resolution rather than merely focusing on Nixon himself. Yoo's historical analysis thus points to a conclusion more tempered than what some on the left may expect: Presidents must recognize that they have independent powers and may employ their own policies during crises, but they also must often cooperate with Congress in carrying out these policies in order to avoid being unnecessarily constrained and possibly removed from office.

What are the roles of Congress and the courts in foreign affairs and other traditionally executive spheres? Yoo makes the strong argument that while the President has the advantages of "energy, speed, decisiveness, and secrecy, among others," which are absent in Congress, and thus is well-suited to take the lead during foreign and domestic crises, Congress still has the power to restrain him when it feels he has overstepped his boundaries or has made unfavorable policy decisions. Congress is thus a powerful actor that the President must respect: it may cut off funding for his policies, refuse to ratify his treaties, or even impeach and remove him from office.

While Yoo recognizes that the judiciary may check the President politically by issuing unfavorable decisions, he argues that the courts do not have a final and binding power to constrain the President's actions:

The judiciary has an equal right to interpret the Constitution, but its opinions are no more binding on the other branches than the decisions of the President and Congress bind the courts. Supporters of judicial supremacy today either agree with the results of the Supreme Court's current opinions or see wisdom in having one institution decide the Constitution's final meaning. But they ignore the long historical practice of presidential interpretation of the Constitution, and they have no solution for mistaken judicial decisions like *Dred Scott* or *Plessy v. Ferguson*.

Yoo cites various instances in which the President, maintaining his own interpretation of the Constitution, has contravened court decisions. Jackson did not enforce the Supreme Court's decision striking down a Georgia law that the Court deemed infringed upon the federal government's power to deal with the

Cherokee in *Worcester v. Georgia*. Lincoln ignored the Court's decision in *Merryman* holding that he had unconstitutionally seized Congress' power by suspending habeas corpus in certain states.

Some may argue that, under this view, the courts have little power to influence the actions of the other branches: if the President is not bound under the Constitution by the Supreme Court's interpretation of the law, what can stop the President and a complicit Congress from simply ignoring the Constitution and passing and enforcing any laws as they see fit? Such arguments do not take into account the fact that Presidents have almost always complied with judicial decisions due to the political dangers inherent in contravening them. A President who fails to heed Supreme Court decisions risks, among other punishments, being voted out of office or being impeached for flaunting the judicial role in the constitutional system. No President will ignore Court decisions lightly, but, as Yoo points out, the Constitution does not give the judiciary the power to completely restrain the President from carrying out his policies when a crisis requires him to act, when the President's authority derives directly from Article II of the Constitution. Just as FDR acted beyond the scope of the Neutrality Acts by supplying Great Britain with arms during World War II in order to defend the United States against the threat of Fascism, the President is allowed to act according to his own Article II powers to deal with crises threatening the nation's security in spite of unfavorable judicial precedent.

Yoo's historical analysis is relevant to our present state of affairs, and his constitutional arguments are cogent. While he denies at the beginning of *Crisis and Command* that the book is "a brief for the Bush administration's exercise of executive authority in the war on terrorism," it is nevertheless a compelling case for why President Bush's exercise of his war powers in response to the attacks of September 11, 2001, did not exceed constitutional limits. The Presidents discussed most favorably in this book interpreted their powers broadly to defend the United States from foreign and domestic emergencies, and many of them sought congressional approval for their actions far less than President Bush did at the outset of the war on terror. The book also provides valuable lessons for the current Administration. While President Obama has steered policy unilaterally using his Article II powers in some cases—for example, when he coordinated the recent troop surge in Afghanistan—he has allowed Congress to steer his agenda in some vital matters. As a result, Republicans have argued that the stimulus funds have been spent on pet projects of members of Congress unrelated to economic growth and that the health care bill has become an unwieldy maze of regulations and special handouts in exchange for the votes of key legislators. The Republicans appear to have been winning with these arguments, as evidenced by the victory of Scott Brown in Massachusetts. Yoo would counsel President Obama to take control of his own agenda using his power to make policy and not rely on a fractious legislature to give him what he wishes. If the President does not heed Yoo's advice and allows his success or failure to be determined by Congress, then, instead of living up to the success of Lincoln, his reputation may be doomed to the doldrums of Madison and Buchanan.