

organizations require a firm and determined hand at the helm to commit to a new course. Given the radical re-tooling required, the institutional hurdles present and the time pressure involved, Ashcroft's efforts yielded remarkable results.

The results of all of these efforts after September 11, 2001? During the remainder of Ashcroft's tenure as Attorney General and the service of his successor in that post, the United States has not suffered another terrorist attack on its soil. To be sure, no one can attribute the length of this respite to any single factor, and Ashcroft makes no attempt to take credit for it. Indeed, he provides a sobering reality check by intoning solemnly that we "will suffer more terrorist attacks during this war with al Qaeda. They are fanatical, relentless, and patient. . . . This network will hit us again when they can." Nonetheless, Ashcroft's efforts have surely enabled the nation's antiterrorism network to gain significant ground in the "game of inches."

Ashcroft's memoir accurately conveys to readers the enormous amount of time, energy and resources that the Justice Department devoted to the prevention of further terrorist attacks. What the book does not provide, however—and likely could not provide, given editorial constraints—is a comprehensive depiction of the many other law enforcement priorities that the men and women of the Department continued to tackle after September 11. The Department remains responsible for enforcing the entire gamut of federal criminal law, including corporate fraud, drug trafficking, child exploitation, tax crimes, antitrust violations, intellectual property theft, extraditions and other forms of coordination with foreign law enforcement authorities—the list goes on and on. These efforts had to, and did, continue, and readers would be well served by a fuller portrayal of Ashcroft's tenure as Attorney General.

Ashcroft has given readers much food for thought. His call for "unyielding mental toughness" in the fight against terrorism, his prescriptions for continued advances in our ability to prevent terrorist attacks, and the descriptions of his own efforts to protect our country make for sobering yet inspiring reading.

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## The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11

BY JOHN YOO

Reviewed by Will Consovoy\*

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**T**he idea that the President holds the primary power to manage the foreign affairs of the United States, and retains a substantial degree of autonomy in exercising this constitutional authority, should be uncontroversial. However, recent judicial decisions and the tide of opinion over Bush Administration policies have drawn this principle into question. In *The Powers of War and Peace*, former Justice

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Department official and current professor of law, John Yoo offers an intriguing view of the Constitution's foreign affairs powers and, in so doing, makes an important contribution to the debate over the proper role of the respective three branches of government in matters of war and peace.

*Powers of War* starts from the assumption that the Constitution vested the vast majority of foreign affairs powers in the Executive—not in Congress or in the courts. The Framers, Yoo argues, adopted a regime in which the office best suited to respond to the dynamic nature of foreign affairs, the Executive, would have a relatively free hand to confront international crises. At the same time, however, Congress was relied-upon to control appropriations and domestic legislation, to insure against presidential overreach. Thus, the separate and coordinate powers of the President and Congress allow them either "to cooperate" or "to pursue independent and conflicting foreign policies." But, whatever accommodation is eventually struck between the political branches, matters of war and peace are to be free from judicial interference.

Professor Yoo's analysis of text and history constitutes a sharp departure from that of several notable scholars, such as Louis Henkin, Harold Koh, and Michael Glennon. These authors posit a Constitution that demands "equal participation of Congress and the federal judiciary in national security decisionmaking." The notion that Congress and the courts have an equal role in foreign policy matters is belied, Yoo claims, however, by the plain text. Article II of the Constitution vests "the Executive power" in the President and declares that the "President shall be Commander in Chief of the Army and Navy of the United States." This broad grant of authority differs sharply from the enumerated legislative grant—i.e., the powers "herein granted"—to Congress in Article I of the Constitution. Thus, Professor Yoo holds, the foreign affairs powers allocated to the legislative branch, such as the Senate's role in treaty-making, are exceptions from the general grant of executive authority.

This means, again, that the Constitution does not provide a "fixed process for foreign relations decisionmaking." Rather, in "allocate[ing] different powers to the president, Senate, and Congress, [it] allows them to shape different processes depending on the international system at the time and the relative political positions of the different branches." The Constitution, according to Professor Yoo, thus sets forth a "flexible system for making foreign policy in which the political branches could opt to cooperate or compete. The Constitution did not intend to institute a fixed, legalistic process for the making of war or treaties." Viewed through this lens, the historical practice of the federal government with respect to foreign affairs, according to Yoo, "generally falls within the range of permissible outcomes allowed by the Constitution." *Powers of War* thus espouses a view of separation of powers in the area of foreign affairs that is political in nature—conflict and compromise between the political branches occurs in a power struggle largely without a judicial referee.

With this interpretation of text established, *Powers of War* takes up the spirit of the letter, delving into several contemporary foreign policy disputes; chief among them "whether the Constitution requires congressional approval of war or whether the president has the discretion to initiate

军事敌对行动。”在尤教授的看来，外交政策的灵活决策削弱了这样一种观念，即存在一种单一、正确的战争方式。事实上，根据作者的看法，总统并不一定要在把我们的武装力量投入一场外国冲突之前，先取得国会的同意。该声明——“一种法律功能，定义了国际关系和地位”——并不是制宪者作为对单方面行政行为的立法制衡。相反，对行政行为的立法制衡在于，总统永远不能成功地“没有国会的积极合作而在资助和发动军事行动[.]”

历史，按照作者的看法，支持这种对战争宣告在国际关系中validate force projection作用的看法。美国历史上只宣布过五次战争，但曾向外国战场投入过125次军事力量，包括越南、朝鲜和波斯湾战争以及最近的阿富汗和伊拉克军事行动。正如尤教授所见，“[t]hese examples suggest that the branches of government have established a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and appropriations.”

就其标题而言，《战争权力》并不结束于此对战争权力的考察，尽管它很全面，但它也涉及了和平权力的讨论，特别是在尤教授对条约问题的详细分析中。正如尤教授所解释的，关于宪法对控制条约权力的分配问题，在几个维度上都有涉及。一个被解决的问题是，参议院的建议和同意权在评估条约的智慧以及是否应该进入条约时，是否应该尊重总统的判断。根据尤教授的看法，历史表明，这种 deference to the Executive’s judgment “has never held much sway,” as “[q]uestions about whether the Senate can exercise its own independent judgment on treaties seem to have been long settled by the political system.” 尽管参议院在解释条约方面已经证明是极具争议的，尤教授发现，历史实践已经赋予了总统领导角色。无论是由于制宪者的有意设计，还是由于行政分支的固有结构优势，“executive dominance of treaty interpretation has become a fact of life.”

最后，就国内效果而言，尤教授发现，“the branches have developed a settled practice that emphasizes flexibility.” 事实上，根据尤教授的看法，国会决定将某些条约“nullities as a matter of domestic law”是“a vital means whereby the Congress can check the executive branch. By preventing the nation from carrying out the legislative elements of international obligations, Congress can check efforts by the executive branch to achieve a certain treaty-based foreign policy.” 这是作品中一个重要的洞见。采用一种广泛的“self execution”——一个最近流行的关于

日内瓦公约——法院实际上将立法权力从国会转移到总统，参议院只扮演一个有限同意的角色。正如尤教授所解释的，“[n]on-self-executing has the virtue of leaving foreign affairs in the hands of the political branches, keeping the judiciary out of a policymaking role, and providing the national government with the constitutional flexibility to determine how best to live up to our international obligations.”

这是一个对任何对这些问题有更深理解的人来说，必读之作。《战争与和平》提供了一个有价值的，尽管有些争议的，对 ongoing debate on this topic——sure, not to go away.

