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 Qaedas. 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.

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

By John Yoo

Reviewed by Will Consovoy

The 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 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 allocating 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
military hostilities.” In Professor Yoo’s view, the flexible nature of foreign policy decision-making undermines the idea that there is a single, correct means of waging war. Indeed, according to the author, the President is not obliged to obtain a declaration of war from Congress before committing our armed forces into a foreign conflict. The declaration—“a legalistic function that defines relationships and status under international law”—was not intended by the Framers as a legislative check on unilateral executive action. Rather, a legislative check on the Executive’s war powers exists in that the President could never wage war successfully “without Congress’s active cooperation in funding and raising a military[.]”

History, according to the author, supports this reading of the role of war declarations in validating the projection of force abroad. The United States has only declared war five times, but has committed troops to foreign battle over 125 times, including the Vietnam, Korean and Persian Gulf Wars and the recent military actions in Afghanistan and Iraq. As Professor Yoo sees it, “[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.”

True to its title, Powers of War does not conclude with this examination of war powers, thorough though it is, but engages in a discussion of peace-making powers as well, particularly in Professor Yoo’s detailed analysis of the issue of treaties. As Yoo explains, questions concerning the Constitution’s allocation of control over treaties arise in several dimensions. One question addressed is the extent to which the Senate’s advice and consent authority grants to it a meaningful role in evaluating the wisdom of entering into a treaty or whether the Senate should defer to the President’s judgment as to the merit of a given international agreement. According to Yoo, history reveals that this idea of 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.” While the role of the Senate in interpreting treaties has proven far more controversial, Yoo finds that historical practice has granted the President the leading role. Whether this is due to the intentional design of the Constitution by the Framers, or the inherent structural advantages of the executive branch, “executive dominance of treaty interpretation has become a fact of life.”

Last, as to the domestic effect of treaties, Professor Yoo finds that “the branches have developed a settled practice that emphasizes flexibility.” Indeed, according to Yoo, Congress’ decision to render certain treaties “nullities as a matter of domestic law” is “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.” This is one important insight among many in this work. Adopting a broad view of “self execution”—a recently fashionable argument regarding the Geneva Conventions—the courts actually shift legislative power from the full Congress to the President, with a limited consent role for the Senate. As Yoo explains, “[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.”

A must-read for anyone interested in a deeper understanding of these timely and important issues, The Powers of War and Peace makes a valuable, if to some controversial, addition to the ongoing debate on this topic—sure, not to go away.