

## Striking a Balance

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JOHN YOO, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005), 378 pp. \$29.00.

The title of John Yoo's masterful new book is perhaps too modest. *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* deals with much more than simply war and peace. It tackles a wide field of foreign relations law and, particularly, "how the Constitution will adapt to the globalization of political, economic, and security affairs."

A professor of law at the University of California, Berkeley, Yoo is best known, even notorious, for the subset of foreign relations law dealing with war powers, on which he, while serving in the Justice Department, wrote a famous memo defending broad executive war-making power.

It is not surprising, then, that the first half of *The Powers of War and Peace* focuses on the proper distribution of war powers. Yoo sets forth an exceptionally bold understanding: presidents have the prerogative to initiate any hostilities, and to continue them until they run out of money. Yoo rejects the tired canard that the ceiling of presidential authority is his ability to "repel sudden attacks" unless actual invasion is "imminent." Instead, he argues that the most warlike president would be unable to

move the nation to a state of "total war" because it is expensive to do so, and would sooner or later require supplemental funding. But Yoo's understanding is vulnerable to the practical objection that, with large standing forces, the commander-in-chief could embroil the nation in total war well before supplementary appropriations become necessary.

The second half of the volume, dealing with foreign relations powers other than those of war and peace, is less sensational but of equal significance. Because of his reputation for advocating broad executive war powers, one might expect Yoo to do the same with regard to treaties and international agreements. But although Yoo ably defends the executive's constitutional power to interpret, make, and terminate treaties at will, he also advocates unusually robust Congressional powers in the execution of treaties. Many reviewers exaggerate Yoo's celebration of executive power as bordering on monarchism, and so tend to miss that his *sine qua non* of legitimacy is in fact "popular sovereignty," meaning the popular will reflected as closely as possible.

The centerpiece of his approach is an emphatic rejection of the presumption that treaties are "self-executing," which means simply that a treaty may be enforced by the president once a supermajority of the Senate has con-



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sented and it has been ratified. Yoo locates the case for self-execution in the arguments of Alexander Hamilton and John Jay, but rejects them. Instead, Yoo argues for a presumption of “non-self-execution,” meaning that the president may not enforce treaties without additional implementing legislation passed by a majority vote in both houses of Congress, either by statute or “congressional-executive agreement.”

To analyze “self-execution,” Yoo begins with the Jay Treaty debate of 1796, which centered on whether the House of Representatives, charged with passing laws for the treaty’s domestic application, had the right to reconsider it “on its merits.” James Madison famously defended the House’s right to do so: “[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation.” The issue was not whether deliberation was good, but rather who should deliberate about treaties. Hamilton’s position that the Constitution made treaty law part of the law of the land was supported, Yoo says, by John Jay’s argument in *Federalist* No. 64: “All constitutional acts of power, whether in the executive or the judicial departments, have as much legal validity and obligation as if they proceeded from the legislature.” George Washington agreed, and refused to send Jay’s negotiating instructions to the House.

One would expect Yoo to side with Hamilton and Jay (and Washington) since, when discussing war powers, he rejects as totally “unconvincing” Madison’s reasoning in the 1793 debate with Hamilton about Washington’s authority to issue the Neutrality Proclamation. Yet Yoo insists that Madison’s arguments about treaty power be taken as

gospel. He calls the interpretations of Jay and Hamilton “haughty” and “extreme,” and less “evolved” theories of republicanism.

But his more “evolved” stance also seems more simplistic. Hamilton and Jay saw ratified treaties as having the “force of law,” but Yoo explains this away by saying that because treaties are not passed by both houses, they are not law—and so are in fact purely executive. He shoehorns international agreements into two tidy boxes, the purely “executive” and the purely “legislative”—squeezing out what Hamilton in *Federalist* No. 69 called a “distinct department,” and what John Locke termed the “federative” power.

Yoo’s attachment to popular sovereignty is problematic. But the international environment today makes his position against self-execution, if not compelling, then at least salutary. As the degree of foreign involvement in the United States has increased since World War II, so too have international agreements. What once would have been considered extraordinary international connections have, with globalization, now become commonplace. The use of international agreements to circumvent the ordinary lawmaking process threatens to supplant the deliberation so vital to good government.

This makes some sense. But, to be clear, it also implies that the Framers’ Constitution as interpreted by Jay, Hamilton, and Washington is inadequate to meet the requirements of the twenty-first century. Yoo’s elevation of popular sovereignty also contrasts with *The Federalist’s* theme that representatives must “refine and enlarge the public views,” and that the departures from direct democracy are necessary for good government. John Dewey once famously remarked

that the remedy for the ills of democracy is more democracy; John Yoo prescribes more democracy for the ills of “global governance.”

*The Powers of War and Peace* is nothing less than an effort to protect American self-government against increasing entanglement in the international system, certainly no small task. In the end, Yoo’s remedy may be problematic. But his reasons for seeking one should be apparent to all.

