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Book Reviews

CONSTITUTIONAL CONTORTION? MAKING UNFETTERED WAR POWERS COMPATIBLE WITH LIMITED GOVERNMENT

THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11. By John Yoo.¹ University of Chicago Press. 2005. xii + 366 pp. \$29.00

*Gordon Silverstein*²

War requires strong, centralized and efficient government. But that same sort of government is a conservative's worst nightmare when it comes to domestic policy. This has left conservatives with a stark constitutional conundrum, at least since the First World War: Must they sacrifice a commitment to limited government in order to play an essential world role? Or, conversely, must they sacrifice that world role to assure liberty and limited government at home?

This dilemma literally exploded onto the American political agenda on September 11, 2001. In the aftermath of that crisis John Yoo—then a Deputy Assistant Attorney General—contributed a series of memos articulating legal theories to support the Bush Administration's assertion of war and treaty powers. Having now returned to his position as Professor of Law at

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2. Assistant Professor of Political Science at the University of California, Berkeley. AB Cornell University 1981; PhD, Harvard University, 1991. Professor Silverstein is the author of *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* (1997) and the forthcoming *HOW LAW KILLS POLITICS* (W.W. Norton).

Berkeley's Boalt Hall, Yoo has written a comprehensive book attempting to construct a constitutional justification for this assertion of extraordinarily broad Executive power and yet, at the same time, a theory that attempts to build barricades against the risk that this massive central power might blow back, and erode constitutional limits at home.

Professor Yoo argues that properly understood, the Constitution as written and ratified not only allows, but expects Presidents to exercise a free hand in foreign lands, giving Presidents nearly unlimited powers in war, along with virtually unconstrained authority to interpret or even terminate treaties such as defense pacts with Taiwan, Anti-Ballistic Missile agreements, and the Geneva Convention Accords on the Treatment of Prisoners and the U.N. Convention Against Torture.³ But this very same Constitution, Yoo argues, limits the creeping spread of global governance and the risk it poses to limited government and individual liberty at home.

Professor Yoo's theory rejects a reliance on original intent or meaning as expressed by the Constitution's authors, building a fairly open-textured "original understanding" of those who ratified the document in the States to support his view. It was this understanding, shaped by that generation's own experiences, education and cultural context that Yoo believes should guide us through the Constitution's more ambiguous phrases when it comes to war and foreign affairs.

A thoughtful conservative scholar and professor, Yoo insists that the Constitution—at least in foreign affairs—has evolved in ways very much in keeping with the distribution of power those who ratified the Constitution might well have "anticipated" and well understood (p. 295). He frequently asserts these sorts of presumptions: "Struggle over the powers of war and peace would have remained at the center of the Framers' memories of British political history" (p. 46); "In considering the foreign affairs power, the Framers would have looked to recent British political history as much as to intellectual thought on the separation of powers" (p. 45); and "a majority of the Framers probably

3. Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 46, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113. The United States signed the Convention in April, 1988, and it was ratified on October 21, 1994.

believed that the President enjoyed a ‘protective power’” (p. 100); to note just a few of many.

Yoo’s claim is that when it came to the powers of war, the framing generation (if not the framers themselves) “would have” understood the relationship of Congress and President “to mimic the British forms of government” (p. 65). Yoo makes a powerful case that the founding generation, steeped in English law and Parliamentary history and fearful of the anarchy threatening to disintegrate the young nation under its original charter of government, built a new government that would be able to confront these dangers. The answer they came up with, Yoo argues, was to recreate the relationship between King and Parliament. There are striking parallels—and Yoo does a service by pointing them out—but there are profoundly striking differences that he largely ignores.

In England, the Crown alone decided on when to go to war, and how to fight. But this power was checked by Parliament’s control of the purse strings. Therefore, Yoo concludes, since Congress today retains ultimate control of the purse-strings, and since (at least in practice) the Executive has assumed the initiative in war powers and foreign policy, we should maintain this division of labor.

There are two problems here. First, does this division of power accurately reflect the constitutional design? And second, was the allocation of powers he focuses on the means or the ends? In other words, was the division of initiative and finance the objective in this institutional design—or was that merely the means employed to balance the two branches of government? If it was the later, then our focus ought to be on maintaining this balance rather than any particular distribution of specific powers.

Of course the founding generation could not escape its own experiences and education. Thomas Jefferson acknowledged that there were “some among us who would now establish a monarchy,” but these people, Jefferson insisted, are “inconsiderable in number and weight of character.” Jefferson admitted that his own generation was “educated in royalism,” but “our young people are educated in republicanism. An apostasy from that to royalism is unprecedented and impossible.”⁴

4. Thomas Jefferson, letter to James Madison, March 15, 1789.

Though they built their new government on old foundations, the institutions they put in place were anything but the sort of replica Yoo asserts the ratifiers “would have” intended or embraced. As James Madison made clear in *The Federalist No. 37*, the founding generation was painfully conscious of how inadequate were the existing models on which they might build their new system. All “the other confederacies which could be consulted as precedents” throughout human history had failed, Madison noted, and could “furnish no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued.”⁵ The most the Americans could do, Madison insisted, was “to avoid the errors suggested by the past experience of other countries,” and try to develop new institutions that might be as self-correcting as possible, that would “provide a convenient mode of rectifying” our own errors “as future experiences may unfold them.”⁶ It seems, then, that though the Americans surely were influenced by the relationship of King and Parliament, they were consciously attempting to develop new institutions and new institutional arrangements.

Yoo is right that the key congressional power was (and remains) the power of the purse. And while the President is assigned the duty of Commander-in-Chief, it is Congress alone that is charged with the power to “raise and support” armies and navies; to tax and to spend. But why this arrangement? Why this division? Was the division of authority the end itself? That is the second part of the problem with Yoo’s argument. The purse is still the most important and powerful weapon Congress has to fight off an aggressive President. But it is far less potent and far less meaningful than was the Parliamentary purse.⁷

For one thing, the United States in 1789 had no standing army, and no taste for one either. It was in fact the lack of a large and mobile standing army that delayed American entrance into World War I, and again, a major problem in the months before the United States entered the Second World War. But thanks to the Cold War and a growing world role, the United States now has more than 1.4 million uniformed troops on active duty, 24-hours a day, 365-days-a-year, with nearly another mil-

5. THE FEDERALIST NO. 37 (James Madison).

6. *Id.*

7. These themes are more fully explored in GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* (1997).

lion active-reserves and spends more than \$400 billion a year to supply and support those troops. This money can be cut off, of course, but not easily. Congress, Yoo blithely asserts, “can always cut off the funding for military adventures” by “simply refusing to appropriate new funds or constructing offensive weapons systems.” This “effective check on the President’s powers,” Yoo approvingly concludes “renders unnecessary any formal process requirement for congressional authorization or a declaration of war before hostilities may begin” (p. 294).

It is one thing to assert that Congress can use the power of the purse to control foreign policy. That is certainly true. But this is not an easily targeted—or easily deployed—weapon. “Congress can simply defund” weapons systems, or military adventures, Yoo asserts. They *can* in theory—but can they so easily in fact? Here Yoo skates over the critical factor political scientists worry about all the time: power.

There is a distinct difference between legal authority to cut funds (which Congress unquestionably retains) and the *ability* actually to *exercise* that power. Yoo certainly is right that Congress has the *authority* to “use its power of the purse to counter presidential warmaking” (p. 152); that Congress has the *authority* to “cut off the funding for military adventures” (p. 294); and that Congress has the *authority* to stop wars “merely by refusing to appropriate the funds to keep the military operations going” (p. 13). But authority is not effective power. Does Congress actually, credibly have the *ability* to use this overwhelming weapon? It is important for legal scholars to decide who has what formal legal authority, but if we are looking at an evolving set of institutions, as Yoo insists we must when it comes to foreign policy, then we must consider not only the weapons each branch brings to the battle, but their ability to use those weapons effectively.⁸

We should “keep in mind the distinction between two senses in which the word *power* is employed,” Richard Neustadt wrote in 1960. One sense is when it is used “to refer to formal constitutional, statutory or customary authority” and the other is in the “sense of effective influence on the conduct of others.”⁹

8. Yoo endorses a living constitution when it comes to foreign policy. Modern practice in foreign affairs, he writes, falls “within the bounds set by the constitutional text and structure.” And he finds “that the constitutional text and structure provide far more flexibility to the president and Congress than has been commonly understood” (p. 10).

9. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 321 n.3 (Free Press ed., 1990) (1960).

Harry Truman's famous musing about the frustration former General Dwight Eisenhower would feel when he took over as President illustrates this well. "He'll sit here," Truman said of Eisenhower, "and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."¹⁰

What was the purpose of the allocation of power in 1789? Was it simply a lawyerly exercise in dividing an estate, assigning specific duties to each branch and then leaving it to those parties to negotiate adjustments in these assignments? Or, was it meant to structure and maintain a balance of power between the branches? If the latter, then the ways in which Congress has become less able to wield this weapon is critical—and clearly out of keeping with the original understanding as well as the original intent.

Does Congress have the *authority* to cut off funds in the middle of a war? Yes. But *can* Congress do so? Does it have the *power* to do so? Consider what only recently befell Jack Murtha, Member of Congress from Pennsylvania when he suggested that the United States begin to curtail its involvement in Iraq in November, 2005. This 37-year career Marine Corps Officer, and holder of two Purple Hearts, a Bronze Star and a Distinguished Service Medal from the Marine Corps was accused, on the floor of the United States House of Representatives, of being a traitor to his country—by another Member of Congress. And while Representative Jean Schmidt (R-OH) quoted a constituent who wanted Murtha to know "that cowards cut and run, and Marines never do," and House Speaker Dennis Hastert (R-IL) said Murtha and his Party "want us to wave the white flag of surrender to the terrorists of the world."¹¹

The Vietnam War is another case on point. The famous Tonkin Gulf resolution was used by Presidents Johnson and Nixon as a clear endorsement of their management of the war. When Congress finally repealed the Act, in June, 1970, it made no difference at all. Nixon continued to pursue the war for another three years, while Members tried to cut off funds. They were unable to do so for three years. But not for lack of will, but rather because of an institutional feature that Yoo ignores.

10. *Id.* at 9.

11. Steven Thomma, *Murtha Mirrors District on Iraq*, ORLANDO SENTINEL, Nov. 20, 2005, at A19.

It takes just a simple majority to hand power to the president—but to take it back almost certainly will require a veto-override. In other words, there is a powerful ratchet effect here—it requires 50-percent plus one to give power away, but 66 percent is required to get it back again. Does this change the fact that Congress has the formal authority to stop a war with the power of the purse? No. But it certainly changes our understanding of their ability to use that power. Congress faces not only intense political constraints on its ability to use this power, but institutional limits that no King or Parliament ever “would have” or ever “could have” recognized.

For many, John Yoo’s name has become synonymous with torture. This is both fair, and unfair. It is unfair since Yoo surely does not *advocate* torture, but it is fair since it was his legal work that laid the constitutional justification for the Bush administration’s declaration that the Geneva Accords on the Treatment of Prisoners would not apply to non-uniformed combatants captured in the war on terror in Iraq and Afghanistan, or for that matter, anywhere in the world. It was his work again that was relied upon by the Administration in justifying its reinterpretation of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment.

The Powers of War and Peace makes no mention of torture, save an oblique reference in the preface. But it very clearly lays out a constitutional theory to justify the President’s unilateral decisions on the applicable treaties and conventions. In essence, Yoo argues, the President alone has a virtually unconstrained power not only to negotiate treaties, but to interpret them, and abrogate them at his discretion.

“Treaties represent a central tool for the exercise of the President’s plenary control over the conduct of foreign policy,” Yoo writes, and “in the course of protecting national security, recognizing foreign governments, or pursuing diplomatic objectives, the President may need to decide whether to perform, withhold, or terminate U.S. treaty obligations” (p. 184) He insists that this conclusion is bolstered by the U.S. Court of Appeals for the D.C. Circuit’s ruling in a dispute over President Carter’s decision to abrogate the American defense treaty with Taiwan in order to advance relations with the People’s Republic of China. And Yoo is quite right about the Appeals Court’s ruling. He focuses on the finding in this case—a victory for the President. He does not, however, pay much attention to the Supreme Court’s ruling in this case. As a matter of law, that may be

fine, but as a matter of constitutional interpretation, it's a problem. Despite the fact that the Supreme Court dismissed the case, a number of Justices took the extraordinary action of filing opinions.

In his suit, Senator Barry Goldwater (R-AZ) insisted that the Senate has a constitutional right to a role in treaty terminations. The Appeals Court ruled that though Goldwater had standing to sue, the President was within his constitutional authority. But *not* because of a prerogative power to terminate treaties, but mostly because the treaty in question lacked any sort of specific termination clause calling for a Senate role. In other words, the Senate had failed to reserve for itself a role in treaty termination. More important, the Appeals Court suggested, was the fact that the Senate as a body had made no effort to assert that right since Carter's decision. In essence, the Appeals Court held that the Senate had the political weapons it needed to fight Carter's decision, but had chosen not to use them. Thus the court would not do what the Senate was unwilling to do for itself.

On appeal to the Supreme Court, the Justices split, and ordered the suit dismissed, but failed to arrive at any clear rationale.¹² Justice Powell's opinion, however, emphasized that the case was not "ripe." The Senate, he argued, had not acted and therefore there was no actual case or dispute between the branches. Justices Rehnquist, Stewart, Burger and Blackmun argued that the suit should be dismissed as a political question, while only Justice Brennan dissented, arguing that the case was ripe, and justiciable, and that the President did indeed have the constitutional authority to do what he had done.

Justice Powell insisted that the Court would not rule in disputes between the President and Congress "unless and until each branch has taken action asserting its constitutional authority" but "if the President and the Congress had reached irreconcilable positions," then the Court would have "to provide a resolution pursuant to our duty 'to say what the law is.'"¹³ This suggests far greater constitutional ambiguity in the treaty clause than Yoo perceives. If Yoo's primary objective in this book were simply to outline a constitutional defense of Executive power in war and

12. *Goldwater v. Carter*, 444 U.S. 996 (1979). See also the more extensive discussion in the lower court consideration of this case, *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

13. *Goldwater*, 444 U.S. at 996, 1001 (Powell, J., concurring).

foreign policy, this book would have been easier to write, and a bit easier to read. There would be much more to debate in his historical interpretation, in his selective reading of some of the key precedent cases and in his blithe assumptions about what the founding generation “would have” or “could have” understood. But Yoo’s ambition, and concern, is wider than just the scope of the war power.

Yoo seems convinced that he has resolved the great conservative conundrum, finding a way to read the Constitution broadly in foreign policy, and yet protect domestic politics from the dangers inherent in big, efficient and central government. This dilemma, which has bedeviled conservatives at least since the First World War, was first articulated by a Republican Senator from Utah who would later go on to serve on the U.S. Supreme Court.

America’s belated and ill-prepared entry into World War I provoked George Sutherland to struggle with this dilemma first on the floor of the U.S. Senate,¹⁴ later in a collection of lectures he gave at Columbia University after leaving the Senate (and published in 1918, shortly before the end of the war),¹⁵ and then in a series of Supreme Court cases in which then-Justice Sutherland articulated a doctrine of strictly limited power in domestic affairs, and a very broad, centralized power in foreign policy.

Sutherland insisted that Americans had only three options for the future. They could simply abandon the Constitution as hopelessly out of date and inadequate to deal with modern dilemmas. They could stick with the traditional constitution, strictly limiting the role of government across the board, and abandon any role in world affairs. Or they would have to find a way to read the same Constitution narrowly at home, and broadly when it came to foreign policy.

Sutherland had a chance not only to articulate a theory that might accomplish this last option—but he seized the opportunity to write it into law when Warren G. Harding put Sutherland on the U.S. Supreme Court. A few years later, in *United States v.*

14. GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 61-417 (2d Session, 1909) [hereinafter, SUTHERLAND, INTERNAL AND EXTERNAL], later published as *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910).

15. GEORGE SUTHERLAND, CONSTITUTIONAL POWERS AND WORLD AFFAIRS (1919) [hereinafter, SUTHERLAND, CONSTITUTIONAL POWERS].

Curtiss-Wright Export Corporation,¹⁶ a case that is often quoted, and rarely studied, Sutherland did just that.

Curtiss was a case about delegated powers—could Congress delegate discretionary power to the President to cut off arms sales to belligerents in a border fight between Paraguay and Bolivia? The Curtiss-Wright company not only challenged the delegation, but also argued that the national government lacked constitutional authority to suspend their sales of machine guns and planes to either country (or, as it happens, to both).

Sutherland, one of the “Four Horsemen” of the Supreme Court devoted to federalism and actively employing the commerce and contract clauses of the Constitution to fend off government interference with individual liberty in general, and the expansion of the national government into the states’ sphere in particular, faced a real dilemma. To say the Constitution would not permit the national government to act in foreign affairs would be to essentially abandon any hope the U.S. might have of playing an effective world role. But, to say the national government had this broad power might fundamentally undermine the very limits Sutherland insisted on in domestic cases ranging from *Carter v. Carter Coal* to *Schechter*.¹⁷

“The question which does arise is startlingly simple and direct,” Sutherland wrote in his book. “May the power be exercised by governmental agency at all? A negative answer to this question in any given case, it will be seen, might be of the most serious consequence. . . . Any rule of construction which would result in curtailing or preventing action on the part of the national government in the enlarged field of world responsibility which we are entering, might prove highly injurious or embarrassing.”¹⁸

Historian Walter LaFeber argues that this dilemma “was perhaps the central problem challenging the Constitution as the United States became a global power between the 1890s and 1920.”¹⁹

Curtiss-Wright was Sutherland’s answer: The Constitution, he insisted, was to be read differently in foreign and domestic af-

16. 299 U.S. 304 (1936).

17. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

18. SUTHERLAND, CONSTITUTIONAL POWERS, *supra* note 15, at 20–21.

19. Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, in *THE CONSTITUTION AND AMERICAN LIFE* 51 (David Thelan ed., 1988).

fairs. Foreign policy powers are sovereign powers, Sutherland wrote, and since sovereignty is and must be indivisible, those powers passed whole and intact from the national government of Britain (King and Parliament) to the national government of the United States—first to the Continental Congress and then to the national government under the Constitution—Congress and the President, together. Domestic power, by contrast, passed from King and Parliament to the separate states. The states, in turn, then delegated specific, limited and enumerated domestic powers to the national government.

Even for Sutherland, foreign policy powers had limits. And while the authority of Congress together with the President's own powers were broad and deep, Sutherland insisted that they "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."²⁰

But how to prevent this strong national power in foreign affairs from coming home? Sutherland's theory depended on a critical firewall, a clear constitutional barrier. And it relied upon a vigilant patrol to protect that barrier. This seemed quite plausible in 1936, with the Supreme Court steadfastly deploying the Commerce and Contract clauses to block any excess national power from eroding federalism and individual liberty. But just one year later, in 1937, the barrier was breached, and the firewall punctured.

Sutherland's solution couldn't even outlast his own tenure on the Court. But that has not stopped conservatives from continuing to struggle to find a way to solve this dilemma. Far from disappearing, the problem has taken on new dimensions in the post-Cold War world of globalization. "Just as nationalization created a demand for regulation of the economy at the national

20. *Curtiss-Wright*, 299 U.S. at 321. Though Sutherland is regularly cited as doctrinal support for a theory of prerogative war powers for the President, his earlier writing and lectures suggest that his concern really was national power (Congress and President together) and not prerogative powers for the President. In his earlier lectures and the published versions of these talks, there is clear evidence that Sutherland saw a far more limited role for the President. "The war powers, with the exception of those pertaining to the office of Commander-in-Chief, are vested in Congress," Sutherland wrote in 1910, "and that body must exercise its own judgment with respect to the extent and character of their use. The advice and counsel of the President should be given great weight, but the acceptance of the President's recommendations must be the result of intelligent approval and not of blind obedience." SUTHERLAND, INTERNAL AND EXTERNAL, *supra* note 14, at 76, cited and discussed in Roy Brownell, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 17 n.37 (2000).

level,” Yoo writes, “so too globalization has increased the need for regulation at the international level” (p. 301).

A national government empowered to conduct foreign affairs is also a national government empowered to bind the country and its people to international commitments and obligations that might erode sovereignty, and subject individual citizens to the long reach of international regulatory regimes, rules and laws over which they might have very little if any control. These risks range from resource allocations to pollution limits; from the threats of international criminal law to international restrictions on the use of capital punishment by state courts. As Yoo puts it, the “problems of globalization have prompted the formation of international institutions designed to coordinate a multilateral policy solution. As these international institutions increase in number and authority, they will place increasing pressure on the Constitution’s structures for democratic decisionmaking and accountability” (p. 299).

Under John Yoo’s theory this problem is even more acute since he staunchly defends not only broad national power, but nearly unfettered Executive power in war and foreign policy. How then to guarantee that a President constitutionally empowered in this way can’t easily exercise these vast powers to enter into agreements that will open America and Americans to the risks of global regulation?

Professor Yoo spends the first half of his book articulating a strong, vibrant, living constitution, and assigning virtually unlimited powers to the President. How then to prevent that muscular White House from entering into all sorts of international agreements that might bind Americans and sacrifice their sovereignty whether over trade, environmental regulation or international criminal proceedings?

The answer for Yoo is the Treaty Clause—again, properly understood. The Treaty Clause is part of Article II—the Executive Powers. Yes, treaties require the advice and consent of two thirds of the U.S. Senate, but it is an Executive power, meaning the President has the power to negotiate treaties; the power to interpret them, and, Yoo insists, the power to abrogate them at will, and without Senate or House participation. Over time, a second instrument has emerged—congressional-executive agreements. These are simple statutes, requiring a simple majority vote in each house. Each has its advantages, and they have been largely used as convenience and efficiency dictated.

But that's the problem—and the solution, Yoo says. Unlike the war powers, where he embraces “current practice,” here Yoo insists on far more technical precision. Treaties are still required where the nation is making broad commitments overseas to political and military agreements. But where international agreements will have direct domestic effect, Yoo says, Congress must be involved. Without enabling legislation, Presidents cannot do by treaty what they otherwise would need a statute to accomplish. This would include trade agreements, regulations concerning fuel emissions, or health standards, the jurisdiction of international criminal courts, or any obligation that will require new taxes, for example.

This seems a neat and clean line. But it's not. The line between classic politico-military agreements and international obligations with direct domestic effect are fast eroding in our global age. This would mean, therefore, that Yoo has created his own power-ratchet: Binding the nation and its people to agreements with direct domestic effect will be exceedingly hard, since it will require both a treaty (with its Senate super-majority) *and* congressional enabling legislation. But getting out of these agreements will be exceedingly easy, since Yoo has already made clear that his understanding of the Constitution cedes to the President the exclusive power to abrogate treaties. George Sutherland would be proud.

But has Yoo really solved the great conservative conundrum? Can we really bifurcate the Constitution, bolstering foreign policy power without the risk that this very same power might blow back and undermine individual liberty at home? The evidence suggests that we cannot.

Both Sutherland and Yoo share a sincere concern for individual liberty. This is the root of their desire to cabin national power. But the problem is that artificially splitting the Constitution into a document of broad foreign policy powers assigned to the national government (Sutherland) or the President (Yoo) actually exposes us to a far more dangerous threat to liberty—it is the danger that these extraordinary, extra-constitutional powers in foreign policy can, will, come home to undermine civil liberties. In fact, they already have done so. If a President enjoys unchecked power in foreign affairs to assure national security, if, as Yoo says, we should assume that the Constitution was designed to produce “the most effective exercise of national power necessary to achieve those foreign policy objectives” (p. 20), then what is to prevent a President from asserting that national secu-

rity abroad requires (and empowers the Executive) to violate civil liberties at home?

This isn't a hypothetical. It's already happened. First, and most prominently, during the Nixon administration. And now, some fear, it is happening again in the open, through statutes like the Patriot Act, and in secret in ways we will only find out about years from now.

Richard Nixon had no hesitation in asserting that national security abroad *constitutionally* expanded his power at home. In a 1977 interview, Nixon claimed the Constitution authorized the President to break the law. As Nixon put it, "when the President does it, that means that it is not illegal." If the President, Nixon added, "approves something because of the national security . . . then the President's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position."²¹

This argument was actually advanced in court, in a 1971 case called *U.S. v. Smith*, where Nixon Administration lawyers insisted that the President, acting through his Attorney General, "has the *inherent constitutional power* (1) to authorize, without a judicial warrant, electronic surveillance in "national security" cases; and (2) to determine unilaterally whether a given situation is a matter within the concept of national security."²² The court rejected these claims, and ordered the government to surrender the transcripts of their surveillance to the defendant. But the point is to suggest that far from being the post-hoc rationalization of a President forced to resign his office, these were very much the work product of the Justice Department in 1971—and they are no less likely to be the sorts of arguments the current Justice Department is offering today. And while the courts rejected these arguments in the early 1970s, will today's courts, heavily staffed by the George W. Bush administration, see things the same way?

The problem here is that John Yoo, like Sutherland before him, is attempting to find a way to split a unitary Constitution in two. But that is a dangerous task, since the Constitution is a delicate machine, designed to work as an integrated whole. If the machine is unable to cope with modern conditions, then we really should tear it down and build a more appropriate device. As Thomas Jefferson noted, we should not look at Constitutions

21. Richard Nixon, interview with David Frost, May 19, 1977.

22. *United States v. Smith*, 321 F. Supp. 424, 426 (C.D. Ca. 1971).

“with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.”²³

But before we call a new constitutional convention, we should remember that the “doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”²⁴ And, indeed, as Justice William O. Douglas wrote, we “pay a price for our system of checks and balances, for the distribution of power among the three branches of government.”²⁵ If that price seems too exorbitant, if September 11 has dramatically altered our national values and priorities, then we need a new Constitution. But we should not be trying to force a bifurcated Constitution out of a unitary and balanced system of government. We end up undermining the system as it was designed, as it was meant to be, and as it was and ought to be understood.

23. Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816, quoted in JACK N. RAKOVE, *ORIGINAL MEANINGS* 367 (1996).

24. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring).