



FOR IMMEDIATE RELEASE: October 28, 2005

**THE POWERS OF WAR AND PEACE:
THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11**
By John Yoo

The war on terror raises legal issues that are both complex and unprecedented. They range from the use of force and targeting, to the detention and interrogation of enemy combatants who do not fight on behalf of a nation and participate in a conflict that knows no borders. In *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (University of Chicago Press, October 2005), AEI visiting scholar John Yoo—a former deputy assistant attorney general in the U.S. Department of Justice’s Office of Legal Counsel—answers critics who question whether the present administration has discarded the constitutional framework for making foreign affairs decisions, and makes the case for a completely new approach to understanding what the Constitution says about foreign affairs, particularly the powers of war and peace. Yoo urges us to understand the Constitution’s allocation of foreign affairs powers to permit a flexible decision-making system that can respond to sweeping changes in the international system and in America’s national security posture. In particular, he explores the Constitution’s distribution of foreign affairs powers between the president, Congress, the courts, and the states.

Yoo demonstrates that the legality of the Afghanistan and Iraq invasions cannot be discussed without first identifying both the scope of the president’s commander-in-chief power to use force unilaterally and the tools at Congress’s disposal to restrain him. Similarly, Yoo contends that arguing about whether the Geneva Conventions apply to terrorists will prove fruitless without first unpacking the Constitution’s distribution of the power to interpret treaties among the president, the Senate, the House, and the courts. For Yoo, debating these issues without understanding their constitutional context is akin to arguing over government policy toward speech without first knowing the standards established by the First Amendment.

In *The Powers of War and Peace*, Yoo proposes a constitutional theory of foreign affairs powers that dissents—at times sharply—from conventional academic wisdom. He reconstructs the Framers’ historical understanding of the Constitution’s text and structure by exploring the document’s eighteenth-century British roots, the first state constitutions and the Articles of Confederation, and the drafting and ratification of the Constitution in 1787 and 1788. Yoo concludes that the Constitution depends less on fixed legal processes for decision-making, and more on the political interaction of the executive and legislative branches. The author explains that the Constitution allocates different powers to the president, Senate, and Congress, which in turn allow them to create different decision-making processes depending on their relative political

positions and the contemporary demands of the international system. There is no single, correct method, Yoo argues, for making war or peace; for making international agreements or breaking them; or for interpreting and enforcing international law in the Constitution. Rather, the Constitution allows the branches of government to cooperate or compete in the foreign affairs field by relying on their unique powers.

Yoo reminds us that war has traditionally been conceived of as occurring solely between nation-states. The old international system allowed the United States to choose a war-making system that placed a premium on consensus, time for deliberation, and the approval of multiple institutions. But, as the September 11 attacks made clear, the world is now very different. Rather than disappearing from the world, the nature and the level of threats are increasing, and the magnitude of expected harm has risen dramatically—from the easy availability of the knowledge and technology to create weapons of mass destruction, to the emergence of rogue nations and the rise of international terrorist networks. Yoo argues that because military force unfortunately remains the most effective means of responding to such threats, it makes little sense to commit our political system to a single method for making war or to adopt a war-making process that contains a built-in presumption *against* using force abroad. In addition, the emergence of direct threats to the United States that are more difficult to detect and prevent may demand that the United States undertake preemptive military action. Now more than ever, the costs of inaction—caused, for example, by allowing the vetoes of multiple decision-makers—could be much higher than we imagine, including the possibility of a direct attack on the United States and the deaths of thousands of civilians.

Practically, *The Powers of War and Peace* argues that:

- The president can initiate military hostilities without a declaration of war or other authorization by Congress. Congress's primary method for controlling presidential decisions lies in the power over appropriations. The federal courts have no constitutional role in interfering with the struggle between the president and Congress for control over war making.
- Presidents can violate international law when they decide whether to use force abroad. Thus, even if critics are correct that the invasion of Iraq was illegal under the United Nations Charter, the president still had the constitutional authority to begin hostilities. Congress's authorization for the war, while unnecessary, only underscored the President's constitutional power. Similarly, the war in Kosovo was constitutional, even though it clearly violated international law.
- The president has the authority to interpret and apply treaties on behalf of the United States. He need not consult with the Senate or the courts before interpreting a treaty. The president also has the discretion under the Constitution to unilaterally terminate or suspend treaties. President George W. Bush was well within his powers to interpret the Geneva Conventions as excluding the war with al Qaeda and to hold that the Taliban was never entitled to the benefits of POW status.
- In making treaties, the president and the Senate must cooperate with Congress to implement treaties that rest within the enumerated powers of the federal government. Treaties, on their own, cannot directly regulate the rights and duties of private citizens without implementation by Congress. Simple statutes can perform much of the function of treaties, when combined with an international agreement made by the president, by establishing certain standards of conduct on private citizens.

JOHN YOO is an AEI visiting scholar and a professor of law at the Boalt Hall School of Law at the University of California–Berkeley. He has served as a deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice, as general counsel of the Senate Judiciary Committee, and as a law clerk to Justice Clarence Thomas and Judge Laurence H. Silberman.