

2007

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<http://preserve.lehigh.edu/cas-lehighreview-vol-15/10>

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Defending Liberty, Pursuing Justice

Frank Falcone

Introduction

The United States is a representative democracy that operates through a congressional system under a set of powers specified by the Constitution. The Constitution contains a commitment to “preserve liberty” with a Bill of Rights and other amendments, guaranteeing the freedom of speech, religion, press, right to a fair trial, right to keep and bear arms, universal suffrage, and property rights. The Constitution, the Bill of Rights, laws passed by Congress, and all of the treaties in which the United States has signed, give Americans rights and guidelines to which they can act. These documents also outline the powers and duties of the three branches of the federal government. Recently however, these powers have been distorted, manipulated, and ignored by those in power, who swore to protect them.

Lately, the President has been exerting powers outside his constitutionally-formed boundaries because his lawyers have violated their professional obligation. Not only must lawyers assist their clients in accomplishing their goals, but they have a duty, as an officer of the court and as a citizen, to uphold the law. Lawyers must tell their clients not only what they can do, but also what they cannot do. This duty compels all lawyers, especially lawyers in government service, because their ultimate client is the American people. When representing all Americans, government lawyers must adhere

to the Constitution and the rule of law. The lawyers in the Department of Justice and those in other governmental agencies have supported these unconstitutional actions and frequently attempt to justify them. It is the fault of these attorneys that the principle on which our government was formed has been violated by a dramatic swelling of U.S. presidential war time powers. This deficiency can be seen by examining the constitutional structure, past usages of presidential war power, the War on Terror, and attorney duties.

Constitutional Structure

When the framers gathered in Philadelphia in 1787 to draw up the Constitution, existing models of government in Europe placed the war power solely in the hands of the King. The framers did not follow this tradition. By learning from past mistakes, they deliberately took the power to initiate war from the executive branch and gave it to the legislature. The framers, hoping to attain an ideal of republican government, constructed a Constitution “that allowed only Congress to loose the military forces of the United States on the other nations”.²⁸ The delegates at the constitutional convention decided that the principle of collective judgment, shared power in foreign affairs, and “the cardinal tenet of republican ideology that conjoined wisdom of many is superior to that of one.”²⁹

²⁸ Edwin B. Firmage, “War, Declaration of,” in 4 *Encyclopedia of the American Presidency 1573* (Leonard W. Levy and Louis Fisher, eds. 1994).

²⁹ David Gray Adler, “Foreign Policy and the Separation of Powers: The Influence of the Judiciary,” in *Judging the Constitution: Critical Essays on Judicial Lawmaking 158* (Michael W. McCann and Gerald L. Houseman, eds. 1989).

In the British model, the power to initiate war remained with the monarch. John Locke argues in his “Second Treatise on Civil Government” that to separate the executive and foreign policy powers would invite “disorder and ruin.”³⁰ A similar model appeared in the “Commentaries on the Laws of England”, written by Sir William Blackstone in the eighteenth-century. He defined the king’s privilege as “those rights and capacities which the king enjoys alone.”³¹ Some of the privileges he considered included “the right to send and receive ambassadors and the power to make war or peace.”³²

These models of executive power were well known to the framers. They knew that their forerunners in England had committed to the executive the sole power to go to war. After the Revolutionary War, the founders constructed a model that vested all executive powers in the Continental Congress. The framers gave many of Locke’s foreign policy powers and Blackstone’s principles to Congress. The power to declare war was not given to a single executive.³³ Instead, it was transferred to a group that would make a decision based upon collective wisdom. Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the republican principle’s views on war powers:

The power of declaring war is not only the highest sovereign prerogative; but that it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to

³⁰ John Locke, *Second Treatise on Civil Government*, 146-48 (1690)

³¹ William Blackstone, *Commentaries on the Laws of England* 238 (1803).

³² *Id.* At 239

³³ Joseph Story, *Commentaries on the Constitution of the United States* 50-68 (1833).

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impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead;...It should therefore be difficult in a republic to declare war; but not to make peace...The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation...³⁴

The debates at the Philadelphia convention showed that the framers were determined to limit the President's authority to take unilateral military actions. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since Congress was expected to meet only once a year. James Madison and Elbridge Gerry proposed to substitute the word "declare" instead of "make" in order to give the President "the power to repel sudden attacks" and this motion became law.³⁵

There was no doubt about the limited scope of the President's war power. The duty to repel sudden attacks was only put in place as an emergency measure and only permits the President to take actions necessary to resist sudden attacks either against the mainland of the United States or against American troops abroad. The President never received a general power to send troops whenever and wherever he

³⁴ Id at 60-61.

³⁵ Max Ferrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. 318-319 (New Haven, Conn.: Yale University Press, 1937).

thought best, and the framers did not authorize him to take the country into a full-scale war or to launch an offensive attack against another nation.³⁶ John Bassett Moore, a noted scholar of international law, states:

There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.³⁷

To further limit the power of the executive branch, the framers decided to separate the purse from the sword. The power of the purse, said Madison in Federalist No. 58, represents the “most complete and effectual weapon with which any constitution can arm the immediate representative of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” Madison insisted on keeping the power of Commander in Chief at “arm’s length” from the power to take the nation to war in order to protect civil liberties.³⁸ Madison wrote:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred

³⁶ The Collected Papers of John Bassett Moore 196 (1944).

³⁷ Id at 196.

³⁸ The Writings of James Madison 147-9.

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from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.³⁹

At the Philadelphia convention, George Mason added that the “purse and the sword ought never to get into the same hands, whether Legislative or Executive.”⁴⁰

Despite these studies, John Yoo, legal counselor for the United States Justice Department, argued in 1996 that the framers constructed constitution systems that “encourage[d] presidential initiative in war.”⁴¹ He claimed that the Constitution’s provisions for the war power “did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.”⁴² He concludes that “the war power provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers.”⁴³ That argument contradicts not only statements made at the Philadelphia convention and the state ratification debates but also the text of the Constitution.

Over the next two centuries, several international incidents were by Presidents and their supporters to justify expanding the executive’s war powers at the expense of Congress. The concept of “defensive war” was stretched to explain presidential war-making throughout the world. In the twentieth century, other developments were used to inflate

³⁹ Id at 148.

⁴⁰ Max Ferrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. 139-140 (New Haven, Conn.: Yale University Press, 1937).

⁴¹ John C. Yoo, “The Continuation of Politics by Other Means: The Original Understand of War Powers,” 84 *Cal. L. Rev.* 167, 174 (1996)

⁴² Id. at 197

⁴³ Id. at 242

the President's war power. Without the legal support of our most respected attorneys, this power has extended beyond the intention of the framers and beyond the control of Congress and the public.

Past Usages of War Powers

Presidential use of force during the first few decades after the Philadelphia convention went along with the expectations of the framers. The decision to go to war or to engage in offensive strikes still remained with Congress and the president accepted that principle for all wars whether they were declared or undeclared. This power gradually widened. For instance, in 1845, the President was allowed to provoke war with Mexico by moving troops and vessels.⁴⁴

Soon, presidents invoked the right to protect American lives and property abroad as justification for military intervention in foreign countries. For example, on December 9, 1891, President Benjamin Harrison reported an incident in Valparaiso, Chile to Congress; an incident which resulted in the death of two American seamen and the serious injury of several other Americans. Although Harrison never recommended the use of force, he asked Chili for a suitable apology and adequate reparation for the injury done to the United States or else he would terminate diplomatic relations with them.⁴⁵

Other examples include President Wilson's actions during the outbreak of World War I. In 1914, Wilson issued proclamations of neutrality, and in doing so he banned the

⁴⁴ Charles C. Tansill, "The Presidents and the Initiation of Hostilities: The Precedents of the Mexican and Spanish-American Wars," reprinted in *The President's War Powers: From the Federalists to Reagan* 86 (Demetrios Caraley, ed. 1984).

⁴⁵ Joyce Goldberg, *The "Baltimore" Affair* 103 (1986).

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“transmitting or receiving for delivery messages of an unneutral nature.”⁴⁶ Later, he closed the Marconi Wireless Station at Siasconset, Massachusetts, because it refused to comply with these censorship regulations. Attorney General Thomas Gregory justified these actions by stating that it was the President’s right and duty, in the absence of any statutory restrictions, to close down or seize any plant “should he deem it necessary in securing obedience to his proclamation of neutrality.”⁴⁷

As soon as Germany had refused to abandon its policy of unrestricted submarine warfare, Wilson broke diplomatic relations with them. Later, Wilson made the crucial policy decision to move from neutrality to armed neutrality, by arming American merchant ships, and finally to a state of war with Germany. On April 2, 1917, Wilson called Congress into session to review the continued use of German submarines against neutral vessels. Wilson stated that it “now appears [to be] impracticable,” to remain neutral and asked Congress to declare war on Germany.⁴⁸

President Franklin Delano Roosevelt also led the country from a state of neutrality to one of war. On September 8, 1939, shortly after Germany invaded Poland, Roosevelt proclaimed a state of limited emergency. During this time, the United States supplied war supplies to the Allied Forces to help them in the war against Germany and Italy. In June 1940, when France requested additional assistance from the U.S., Roosevelt expressed his admiration for their “resplendent courage” in dealing with the German troops and promised to

⁴⁶ James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, 20 vols. (New York: Bureau of National Literature, 7969-77

⁴⁷ *Operation Attorney General* 291, 293 (1914).

⁴⁸ Harvey A. DeWeerd, *President Wilson Fights His War: World War I and the American Intervention* 21 (1968).

continue to assist them with airplanes, artillery, and ammunition. He informed France, however, that “these statements carry with them no implication of military commitments. Only the Congress can make such commitments.”⁴⁹

In order to further assist the Allies, Congress passed the Lend-Lease Act on March 11, 1941. This act gave the President the authority to manufacture any defense item and to “sell, transfer title to, exchange, lease, lend, or otherwise dispose of” a defense item to any country whose defense he determined to be vital to the defense of the United States.⁵⁰

In a petition to Congress on April 10, Roosevelt asked for legislation that would allow him to make use of foreign merchant vessels that were lying idle in American ports. Roosevelt said clearly that he lacked authority to use these ships and Congress responded by granting him the necessary legislation.⁵¹ On December 7, 1941, Roosevelt asked Congress to declare war after Japan’s attack on Pearl Harbor and Congress complied with his request.⁵²

In 1954, President Dwight D. Eisenhower asked Congress to pass a resolution giving the President authority to use American air and sea power in Southeast Asia. This was refused by Congress because of the possibility of another Korean War, and they insisted that any involvement by the United States would have to include the support of Britain and the other allies. ⁵³

In August 1964, following President Johnson’s report of an attack against U.S. vessels in the Gulf of Tonkin, Congress

⁴⁹ Public Papers and Addresses of Franklin d. Roosevelt 267 (1940 volume).

⁵⁰ Statute 31, (1941).

⁵¹ Public Papers and Addresses of Franklin d. Roosevelt 94 (1940 volume).

⁵² Id. at 95.

⁵³ Dwight D. Eisenhower, *Mandate for Change* 82 (1963).

passed legislation to authorize the use of armed force. Several years later, U.S. soldiers were stuck in a land war in Southeast Asia and had to deal with huge casualties. As a result, Congress began to re-evaluate its role in twentieth-century wars, and after a long national debate, the War Powers Resolution of 1973 emerged.⁵⁴

In an effort to limit presidential war power, Congress passed the War Powers Resolution. The resolution recognized that the President “in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.” Instead of trying to define the exact conditions under which Presidents may act and use force, the House decided on implementing procedural safeguards. The President would be required, “whenever feasible,” to consult with Congress before sending American forces into armed conflict. He was also to report the circumstances that led him to initiating action and the estimated scope of his activities.⁵⁵ Additionally, the President must remove U.S. armed forces if Congress had not declared war or passed a resolution approving the use of force within sixty days.⁵⁶ If an official request is given by the President to Congress, the time limit can be extended by an additional 30 days only when “unavoidable military necessity” requires additional action for a safe departure.⁵⁷

President Ford and President Carter reported only five uses of armed forces, and three of the occasions under Ford only involved military efforts to evacuate American citizens

⁵⁴ “Southeast Asia Resolution,” joint hearings before the Senate Committees on Foreign Relations and Armed Services, 88th Cong., 2d Sess. 25 (1964).

⁵⁵ Congressional Records 27298-408 (1970).

⁵⁶ *Id.* at Section 5(b).

⁵⁷ *Id.* at Section 5(c).

and foreign nationals from Southeast Asia. Other than those operations, during the six and a half years of Ford's and Carter's terms of office there were only two presidential motions to use armed forces. They were Ford's efforts to rescue the *Mayaguez* crew in 1975, and Carter's attempt to rescue American hostages in Iran in 1980.⁵⁸

Although military activity accelerated during the Ronald Reagan and George H. W. Bush administrations, presidential power was not abused. Reagan submitted 14 reports under the War Powers Resolution and Bush six. Most of the reports referred to major military operations such as the dispatch of U.S. Marines to Lebanon in 1982, the invasion of Panama in 1989, and the war against Iraq in 1991.⁵⁹

President Bush's decision to pull out of Iraq after the military victory, rather than continue on to Baghdad, was later criticized since it allowed Saddam Hussein to regroup and gain power. However, Bush acted in accordance with the UN Security Council resolutions and the congressional statute that only authorized him to take military action to remove Iraqi troops from Kuwait, and not to attack Baghdad. The statute only allowed the President to use U.S. armed forces to eject Iraqi troops from Kuwait.⁶⁰

In *A World Transformed*, a book he later wrote with Brent Scowcroft, Bush states why he discontinued military operations after taking Iraqi troops out of Kuwait. His position is interesting when compared to the more determined plans of George W. Bush, who chose in 2003 to occupy Iraq

⁵⁸ "Seizure of the *Mayaguez*" (parts I and II), hearings before the House Committee on International Relations, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. 18312-13 (1975) 85 Yale L. J. 774 (1976).

⁵⁹ "War Powers, Libya, and State-Sponsored Terrorism," hearings before the House Committee on Foreign Affairs, 99th Cong., 2d Sess. 2 (1986).

⁶⁰ UN Security Council Resolution 660-62, 664-67, 669-70, 674, 667, and 678

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after losing support from many nations, including Germany, France, and Russia. In 1998, Bush stated:⁶¹

I firmly believed that we should not march into Baghdad. Our stated mission, as codified in UN resolutions, was a simple one - end the aggression, knock Iraq's forces out of Kuwait, and restore Kuwait's leaders. To occupy Iraq would instantly shatter our coalition, turning the whole Arab world against us, and make a broken tyrant into a latter-day Arab hero. It would have taken us way beyond the imprimatur of international law bestowed by the resolutions of the Security Council, assigning young soldiers to a fruitless hunt for a securely entrenched dictator and condemning them to fight in what would be an unwinnable urban guerilla war. It could only plunge that part of the world into even greater instability and destroy the credibility we were working so hard to reestablish.⁶²

It is apparent that although past Presidents have expanded their war powers set out in our Constitution, they have all done so with congressional approval. Their actions were done in accordance with the law because they were given proper legal counsel. The adequacy of presidential legal counsel has begun to dwindle over the past ten years with the emergence of the War on Terror. The most senior lawyers in the Department of Justice and other governmental organizations have fought to justify actions that are so inhumane and blatantly illegal that they threaten the principles on which the United States was founded.

⁶¹ George Bush and Brent Scowcroft, *A World Transformed* 464 (1998).

⁶² *Id.* at 464.

War on Terror

On June, 1993, President Clinton ordered an air strike against Iraq. In an address to the nation, he spoke on the attempted assassination of former President Bush during a visit to Kuwait. Sixteen suspects, including two Iraqi nationals, were arrested. Although the trial of those suspects was still underway in Kuwait, the CIA stated that there was “compelling evidence that there was, in fact, a plot to assassinate former President Bush and that this plot, which included the use of a powerful bomb made in Iraq, was directed and pursued by the Iraqi intelligence service.” As a result, Clinton called the attempted assassination of Bush “an attack against our country and against all Americans.”⁶³ In a message to Congress, he said that the attack was ordered “in the exercise of our inherent right of self-defense as recognized in Article 51 of the UN Charter and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief.”⁶⁴

However, Clinton did not consult with members of Congress before ordering the launching of 23 Tomahawk cruise missiles against the Iraqi intelligence service’s principal command and control facility in Baghdad. Clinton said that the attack on Baghdad “was essential to protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people, and to affirm the expectation of civilized behavior among nations... We will combat terrorism. We will deter aggression. We will protect our people.”⁶⁵ However, history has shown that his argument is flawed. As, Michael Ratner

⁶³ Public Papers of the Presidents, 1993, I, at 938.

⁶⁴ Id. at 940.

⁶⁵ Id. at 938-39.

and Jules Lobel, two attorneys of constitutional law noted, “calling the U.S. bombing of Iraq an act of self-defense for an assassination plot that had been averted two months previously is quite a stretch.”⁶⁶ If the United States had evidence of terrorist activity by Syria, why would it have launched cruise missiles against intelligence facilities in Damascus? Other methods, less confrontational, would have been used. Many argue that Iraq was attacked because, like Cambodia, Grenada, and Libya, it was a weak and isolated nation that could be dealt with militarily with little fear of retaliation. This air strike was no more than a ploy by Clinton to demonstrate his military “toughness.”⁶⁷

Following in Clinton’s footsteps, George W. Bush used the excuse of “combating terrorism” to further extend his presidential war power. On September 11, 2001, terrorists from the Middle East hijacked four U.S. commercial airliners and flew two of them into the World Trade Center and one into the Pentagon, killing almost 3,000 people. Bush responded with a proclamation on September 13, where he referred to the terrorist attacks as “acts of war.”⁶⁸

During his administration, President George W. Bush expressed the concept of “preemptive action” much more ambitiously than the presidents before him and at times he even acted unilaterally, specifically when he authorized the creation of military tribunals to try those responsible for 9/11. Throughout this time, Congress and the courts provided

⁶⁶ Michael Ratner and Jules Lobel, “Bombing Baghdad: Illegal Reprisal or Self-Defense?” *Legal Times*, July 5, 1993, at 24.

⁶⁷ Louis Fisher, “President Clinton as Commander in Chief,” in *Rivals for Power*, ed. James A. Thurber 215 (1996).

⁶⁸ *Weekly Compilation of Presidential Documents* 1308.

hardly any legislation and even fewer judicial checks to his military initiatives.⁶⁹

The potential scope of current presidential war power can be seen in the document titled "National Security Strategy," released by the Bush administration in September 2002. This document articulates the doctrine of preemption and, the even broader concept of, preventative war. President Bush pledged to "act against such emerging threats before they are fully formed... [History] will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action."⁷⁰ However, European nations feared that the new doctrine preferred unilateral U.S. military action at the price of multilateral institutions and international alliances.⁷¹

Before using military force against Afghanistan and Iraq, President Bush, after gaining statutory support, acted unilaterally on what he considered to be his independent constitutional power to create military tribunals. On November 13, 2001, he issued a military order to authorize the creation of military tribunals to try an individual who was "not a United States citizen" who provided assistance to the 9/11 attacks. This action was done without mention to anyone on Capitol Hill, including the Judiciary and Armed Services Committees.⁷²

In order to justify this action, Bush cited a unanimous ruling by the Supreme Court in *Ex parte Quirin* (1942), which upheld Franklin D. Roosevelt's military tribunals used to try

⁶⁹ "The Bush Doctrine," Washington Post, September 22, 2002, at WK 12.

⁷⁰ The National Security Strategy of the United States of America, September 2002, page 2 of introductory statement by President Bush, September 17, 2002.

⁷¹ Glenn Frankel, "New U.S. Doctrine Worries Europeans," Washington Post, September 30, 2002, at A1.

⁷² Bob Woodward, *Bush at War* 139-54 (2002).

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eight German saboteurs. William P. Barr, appointed Attorney General by the George H. W. Bush administration, coauthored an article titled, "Military Justice for al Qaeda," where he called the 1942 decision the "most apt precedent" for what the Bush administration wanted to do in 2001.⁷³

Tribunals are usually justified when civil courts are unavailable or not functioning. In addition, the 1942 decision was revisited in 1945 when the Franklin Roosevelt administration adopted an entirely different procedure to deal with two other German spies. In 1942, the eight Germans were charged, assigned defense attorneys, subjected to a trial, and allowed to challenge the tribunal's jurisdiction before the Supreme Court. The Bush administration misapplied the *Ex parte Quirin* precedent when it tried to relate it to U.S. citizens, Yasser Esam Hamdi and Jose Padilla. Although Bush designated U.S. citizens as "enemy combatants," he refused to charge them with a crime, allow them counsel, or bring the matter to trial. Nothing in *Quirin* justifies holding a U.S. citizen indefinitely without access to counsel or a trial and attorneys such as William P. Barr knew this but argued differently out of respect for the President.⁷⁴

In the initial debates of the war against Iraq, the Bush administration announced that President Bush did not need authority from Congress to mount an offensive war against Iraq. The White House Counsel's office presented a broad reading to the President's power as Commander in Chief and argued that the 1991 Iraq Resolution provided continuing military authority to the President, transferring the authority

⁷³ William P. Barr and Andrew G. McBride, "Military Justice for al Qaeda," *Washington Post*, November 18, 2001, at B7.

⁷⁴ Dworkin, Anthony. "Detention of US Citizens May Open Anti-Terrorism Campaign to Legal Scrutiny." *Crimes of War Project* 17 June 2002. 13 Dec. 2006 <<http://www.crimesofwar.org/onnews/news-almuhajir.html>>.

from George H. W. Bush to his son.⁷⁵ This delusion would greatly disturb the framers, since they made the President Commander in Chief, not dictator.

The White House also claimed that Congress, by passing the Iraq Liberation Act of 1998, had already approved U.S. military action against Iraq for violations of the UN Security Council resolutions.⁷⁶ Then again, the statute's efforts were to remove Saddam Hussein from power and replace him with a democratic government. The law states that none of its provisions "shall be construed to authorize or otherwise speak to the use of United States Armed Forces (except as provided in section 4(a)(2)) in carrying out this Act."⁷⁷ The statute authorized military supplies to Iraqi opposition groups, but not war.

Although, Bush eventually abandoned his unilateralist approach and went to Congress for support, Congress was expected to act quickly. According to one newspaper story, White House officials "have said that their patience with Congress would not extend much past the current session." The administration wanted Congress to pass an authorizing resolution before it came to a close for the November elections. This left very little time for independent legislative debate and analysis.⁷⁸

Democrat Robert Byrd led the resistance to this motion. In response to Senator Daschle's statement saying that he intended "to give the President the benefit of the doubt," Bryrd stated, "I will not give the benefit of the doubt to the

⁷⁵ Mike Allen and Juliet Eilperin, "Bush Aides Say Iraq War Needs No Hill Vote," *Washington Post*, August 26, 2002, at A1.

⁷⁶ "Bush Rejects Hill Limits on Resolution Allowing War," *Washington Post*, October 2, 2002, at A12.

⁷⁷ Statute 112 (1998).

⁷⁸ Mike Allen, "War Cabinet Argues for Iraq Attack," *Washington Post*, September 9, 2002, at A1.

President. I will give the benefit of the doubt to the Constitution.”⁷⁹ Byrd saw the debate surrounding Iraq becoming a question of “how best to wordsmith the president’s use-of-force resolution in order to give him virtually unchecked authority to commit the nation’s military to an unprovoked attack on a sovereign nation.” Nevertheless, Congress granted Bush the authority he wanted.

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Later on, Bush referred to the “resolution of support” and said that the signing of the resolution did not “constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution.”⁸¹ Bush stated that his combat order, which he delivered in March 2003, was within his independent constitutional powers.⁸²

The failure to find weapons of mass destruction in Iraq raised the question of whether the Bush administration misinterpreted or altered intelligence reports to amplify the nature of the Iraqi threat. For example, during the time when Congress was considering whether or not to authorize military operations, Bush stated that Iraq “had stockpiled biological and chemical weapons.”⁸³ In addition, on March 6, 2003 shortly before going to war, President Bush said that Iraq “has weapons of mass destruction.”⁸⁴

⁷⁹ Robert C. Byrd, “Congress Must Resist the Rush to War,” *New York Times*, October 10, 2002, at A35

⁸⁰ *Id.* at A35.

⁸¹ *Weekly Compilation of Presidential Documents 1777.*

⁸² *Id.* at 1778

⁸³ *Id.* at 295.

⁸⁴ *Id.* 299.

Congress failed to comply with its constitutional duties when it authorized military action against Iraq. The Bush administration did not present enough convincing information to rationalize statutory action in October 2002 and military operations in March 2003. Congress did not demand sufficient credible evidence before passing the Iraq Resolution. Political scientist and historian, Louis Fisher, writes, "Instead of passing legislation to authorize war, members of Congress agreed to compromise language that left the decisive judgment with the President."⁸⁵ By placing the power to initiate war in the hands of one person, Congress did exactly what the framers hoped to avoid when they drafted the Constitution. Nevertheless, the framers created three branches to combat the union of two. It is not the fault of the president whose job is only to execute the law, nor is it completely Congress's fault whose job it is to create law. It is the judicial branch's responsibly to determine whether or not a law is constitutional and, more importantly, it is our nation's lawyers' duty to make sure justice is carried out.

Lawyer/Department Duties

Lawyers act as both advocates and advisors in our society. As advocates, they represent parties in criminal and civil trials by presenting evidence and arguing in court to support their client. As advisors, lawyers counsel their clients concerning their legal rights and obligations and suggest particular courses of action in business and personal matters. Whether acting as an advocate or an advisor, all attorneys research the intent of laws and judicial decisions and apply them to the specific circumstances their clients face.

⁸⁵ Fisher, Louis, *Presidential War Power*, Second Edition, Revised 235 (Lawrence, Kansas: University Press of Kansas 2004)

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The American Bar Association is the national representative of the legal profession. They serve the public and the profession by promoting justice, professional excellence and respect for the law. John Yoo now sits on the ABA's Advisory Committee and its Standing Committee on Law and National Security. However, he is mostly known for the work he did from 2001-2003 when he served as a deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice. Yoo worked on issues involving foreign affairs, national security, and the separation of powers.

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In the aftermath of the 9/11 attacks, Yoo played an important role in the Office of Legal Counsel to the U.S. Department of Justice, where he frequently defended the most extreme legal actions the administration was considering. For example, in August 2002, he wrote a memorandum arguing that both international and domestic legal prohibitions on torture represent unlawful restraints on presidential power. Yoo advised the President that the framers always intended for the executive to dominate foreign and military affairs. He even ignored the fact that the Constitution places the authority to "declare war" unquestionable in the hands of Congress. Due to Yoo's advice, President George W. Bush typically justified his legal positions in the War on Terror by noting that the Constitution makes him Commander in Chief and thus primarily responsible for defending the American people.⁸⁷

Congress's authority to declare war was written to be a strict constitutional rule so that the executive could not simply mount war without formal congressional authorization. Even

⁸⁶ "About the ABA." American Bar Association. 1 Dec. 2006
<<http://www.abanet.org/>>.

⁸⁷ Shane, Peter M. "Powers of the Crown." The Political Science Review os (2005): 1-3. 1 Dec. 2006.

in the case of repelling sudden attacks, while the executive might need to act immediately in order to defend America, Congress must then be convened in order to provide proper constitutional guidance to the executive.⁸⁸

Critics have called Yoo's interpretation of the framers everything from eclectic to immoral. He tends to devalue and ignore the Constitution because it works against his argument, while focusing on eccentric readings that were never intended to further an argument such as his. Yoo manipulated the notion of the emergency situation so far that he portrayed the many undeniable threats (terrorism) to the nation as being worse than traditional forms of warfare or violent rebellion. William E. Scheuerman states, "If every significant threat to the political status quo (an outbreak of avian flu virus, for example, or another terrorist attack on U.S. territory) necessarily requires massive augmentations of poorly regulated executive power, Americans indeed will probably have to bid farewell to the rule of law."⁸⁹

However, this negligence to the law, to justice, and to the American people does not solely fall on one person. The lawyers who approved and signed the Bush Administration's memoranda, dated January 9, 2002, January 25, 2002, August 1, 2002, and April 4, 2003, have also grossly misinterpreted and disregarded the U.S. Constitution. Among these men are Attorney General, Alberto Gonzales, General Counsel of the Department of Defense, William J. Haynes II, Assistant Attorney General for the Office of Legal Counsel, Jay S. Bybee, and, Justice Department Special Counsel Robert Delahunty.

⁸⁸ Id. at 5-7

⁸⁹ Scheuerman, William E. "The Powers of War and Peace: the Constitution and Foreign Affairs After 9/11." *The Political Science Review* os (2005): 2. 1 Dec. 2006.

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Among other things, these lawyers have advised the President to ignore laws, treaties and the Constitution in regard to the treatment of prisoners because of his role as Commander in Chief.⁹⁰ They have also contrived defenses to avoid independent responsibility for actions that would violate the U.S. Army Field Manual and relevant statutes and precedents. This was done by altering definitions of “necessity,” “self-defense,” and “superior orders.”^{91 92 93}

These lawyers have also instructed the President that he has the authority to authorize the infliction of extreme physical pain and mental distress by defining “torture” so strictly as “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” According to the memoranda, physical or mental pain does not amount to torture except if “it results in significant psychological harm of significant duration, e.g., lasting for months or even years.”⁹⁴ This memo was allegedly prepared in order to provide justification for cruel methods previously practiced by the CIA, in case CIA agents were later prosecuted for breach of the federal anti-torture statutes.⁹⁵

In addition, these lawyers advised the President that regardless of warnings issued by the Department of State, the U.S. does not have to follow the rules set out in the Geneva Convention on the Treatment of Prisoners of War when

⁹⁰ DOD Memo, April 4, 2003.

⁹¹ DOJ Memo, August 1, 2002.

⁹² DOD Memo, April 4, 2003.

⁹³ “Lawyers' Statement on Bush Administration’s Torture Memos.” 4 Aug. 2004. 1.

⁹⁴ DOJ Memo, August 1, 2002.

⁹⁵ “Lawyers' Statement on Bush Administration’s Torture Memos.” 4 Aug. 2004. 1.

dealing with the war in Afghanistan.⁹⁶ The memoranda ignores that the treaty, in fact, regulates all conflicts “at any time and in any place whatsoever,” and also defends “unlawful combatants,” people do not qualify as prisoners of war, from “humiliating and degrading treatment” and mutilation, cruel treatment and torture.⁹⁷ Attorney General John Ashcroft stated that the reason why the administration claimed immunity from the Geneva Convention was to give the American military and law enforcement officers a justification to allegations relating to “field conduct, detention conduct or interrogation of detainees” since their actions are forbidden by the Geneva Convention.^{98 99}

Finally, they condoned the use of mind altering drugs that do not “disrupt profoundly the sense of personality.” As maintained by the memorandum, these drugs must “create a profound disruption... more than that the acts ‘forcibly separate’ or ‘rend’ the senses or personality. Those acts must penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.”¹⁰⁰

These memoranda and others like them attempt to thwart deep-rooted and universally acknowledged principles of law and morality for the pursuit of power. In addition, the memoranda have gone against the practices of the United States since it goes against the principles fostered in the nation’s annual Human Rights Report. Regardless of how one defines it, torture will always remain torture. In August, 2002,

⁹⁶ White House Counsel Memo, January 25, 2002.

⁹⁷ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3 para. 1.

⁹⁸ “Lawyers’ Statement on Bush Administration’s Torture Memos.” 4 Aug. 2004. 2.

⁹⁹ Letter to the President, Feb. 1, 2002.

¹⁰⁰ DOJ memo, August 1, 2002.

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Jay S. Bybee, the Assistant Attorney General, Office of Legal Counsel, issued a belated disclaimer in response to public outcry over the memorandum. However, the disclaimer does not take back the abuses that this memorandum has approved or promoted during the two years that it was in effect.¹⁰¹

Furthermore, several major Supreme Court decisions, various statutes passed by Congress, and explicit provisions of the Constitution itself refute the declaration that the President's authority as Commander in Chief allows him to ignore laws, treaties, and the Constitution. To make matters worse, this declaration also transfers this imagined power to those acting on the President's behalf to violate domestic and international law by practicing violent interrogation methods and other obscene behavior. These legal documents fail to acknowledge the many sources of law that their assertions violate, such as the steel seizure case, *Youngstown Sheet and Tube Co. v. Sawyer* that limits the power of the President to seize private property.¹⁰² The unique and poorly researched statement that the Executive Branch is a law unto itself completely contradicts the rule of law and the notion that no one is exempt from the law.¹⁰³

The lawyers who advised and approved these memoranda have acted against their professional obligations. Not only do lawyers have a duty to assist their clients in accomplishing their goals, but lawyers have a duty, as officers of the court and as citizens, to defend and support the law. Lawyers must not only tell their clients what they can do but also what they cannot do. This duty compels all lawyers, and

¹⁰¹ "Lawyers' Statement on Bush Administration's Torture Memos." 4 Aug. 2004. 1-2.

¹⁰² *Youngstown Sheet and Tube Co. v. Sawyer* 343 U.S. 579 (1952)

¹⁰³ "Lawyers' Statement on Bush Administration's Torture Memos." 4 Aug. 2004. 2.

especially those in government service, since their ultimate client is the American people. When representing all Americans, government lawyers must adhere to the Constitution and the law. As a matter of fact, government lawyers take the following oath: "I . . . do solemnly swear that I will support and defend the Constitution of the United States..."¹⁰⁴

While attorneys of the Department of Justice and lawyers in other governmental agencies have in the past met this standard, current members occupying legal positions in this administration have not only ignored these unconstitutional actions, but frequently attempted to justify them. They have recommend individuals ignore the nation's laws and offered advice to minimize their liability for doing so. By doing this, these lawyers abandoned the standard of their profession and did a great disservice to all American citizens.

Conclusion

The United States Constitution is the government's foundation of law and order. Through its text, laws are constructed and decisions made. Although some areas of the Constitution are vague and require interpretation, the section on the separation of powers is clear. The framers made this section unmistakable because they did not want the United States to be controlled by a king. This standard, coupled with international treaties and policies can also be seen when examining how past Presidents have acted when confronted with wars. While they have all acted in their own way, they all have respected the laws, especially by communicating with Congress. With the help of our government's lawyers, the Bush Administration's actions in response to the events of 9/11

¹⁰⁴ Id at 3.

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have changed the notion of presidential war power from the principle of collective judgment to that of an absolute monarchy.

The American Bar Association's motto is "*Defending Liberty, Pursuing Justice*". Currently, these goals have been disregarded by some of the government's senior lawyers as they have advised the President to act in violation of the Constitution and international law. They have claimed presidential rights that disregard the law, asserted permissibility for illegal and immoral actions, and contrived defenses for lawless procedures. By doing this, these lawyers have shown no respect to the American people, the Constitution, and the principles of justice.



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