#### In 1996 John Yoo authored “Continuation of Politics by Other Means: The Original Understanding of the War Powers,” which is the foundational text of the 9/11 Constitution. This view of the war powers provides the president with near exclusive jurisdiction over all things war. “War Powers” stands as proof of the impact of academic thinking on policy.

Alexander, Stanford Law Professor, 12 [Janet Cooper, John Yoo's War Powers: The Law Review and the World, 100 Calif. L. Rev. 331, April, lexis, access 8-24]

Surely one of the most consequential articles ever published in the California Law Review (CLR), as measured by its effects in the world, is John Yoo's The Continuation of Politics by Other Means: The Original Understanding of War Powers. n1 The article sets forth the copiously sourced n2 thesis that the true historical meaning of the Constitution is that it "established a system which was designed to encourage presidential initiative in war." n3 As Yoo later wrote, the President holds "the plenary authority, as Commander in Chief and the sole organ of the Nation in foreign relations, to use military force abroad" and to make decisions about the amount, method, timing, and nature of the use of military force. n4 In the article he asserts that Congress's war powers are limited: "Congress could express its opposition to executive war decisions only **by** exercising its powers over funding and impeachment." n5 According to Yoo, the Declare War Clause does not grant Congress any power to initiate war, but only the "judicial power" n6 to recognize whether "the nation was [\*333] [already] in a legal state of war" for purposes of "domestic" law. n7 Nor do Congress's other war-related powers n8 limit the President's freedom of action in initiating and conducting war. In Yoo's reading, because Congress is to have the "sole judicial power to decide whether the United States is at war" n9 there is no role at all for the judicial branch in matters of war. n10¶ War Powers has been called Professor Yoo's "breakthrough" work n11 and was instrumental in propelling him to an important job in the Bush administration's Office of Legal Counsel (OLC). n12 There he authored or ghostwrote memoranda that furnished the legal justification for the most significant policies and practices of the Bush administration's "global war on terrorism." n13 OLC opinions are treated as legally binding within the executive branch, n14 and because of Yoo's perceived and claimed expertise in the law of national security and presidential powers, he was given a virtually free hand in crafting opinions on these subjects. n15 These memoranda explicitly relied on [\*334] War Powers, reiterating and further expanding the analysis first advanced in the article. Even though Yoo conceded in War Powers that his theories were contrary to the overwhelming consensus of historians and legal academics, n16 they furnished the sole legal justification for many of the most extreme and controversial policies of the Bush administration.¶ Yoo's OLC opinions advanced a vision of executive power that was breathtakingly unprecedented in its scope, including the claims that:¶ ¶ . the President has "complete authority over the conduct of war"; n17 and "independent and plenary authority over the use of military force"; n18¶ ¶ ¶ . any statute attempting to regulate or "interfere[] with" the President's use of military force would be unconstitutional, n19 and no law "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response"; n20¶ ¶ ¶ . the right of habeas corpus does not apply to detainees held at Guantanamo Naval Base or other locations outside the United States; n21¶ ¶ ¶ . the Detention Act, 18 U.S.C. § 4001(a), which prohibits the detention of American citizens unless pursuant to an Act of Congress, "does not, and constitutionally could not, interfere" with the President's authority to detain U.S. citizens as enemy belligerents; n22¶ ¶ [\*335] ¶ ¶ . the redefinition of "torture," limiting it to acts causing pain "equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result"; n23¶ ¶ ¶ . specific acts such as waterboarding, "walling," n24 confinement with insects, sleep deprivation for up to eleven days, and stress positions, as well as combinations of these methods, do not constitute torture and would not violate the Torture Act; n25¶ ¶ ¶ . conduct that does not fall within Yoo's radical redefinition of torture does not violate the War Crimes Act, n26 the Torture Act, n27 the Convention Against Torture, or the Geneva Conventions, n28 and the International Criminal Court lacks jurisdiction over such acts; n29¶ ¶ ¶ . the Geneva Conventions do not apply to the Taliban n30 or al Qaeda operatives; n31¶ ¶ [\*336] ¶ ¶ . the President has "plenary constitutional authority, as Commander in Chief" to transfer aliens held outside the United States to third countries, a process known as "extraordinary rendition"; n32¶ ¶ ¶ . the President possesses the authority to deploy the military domestically to combat terrorist activities; n33¶ ¶ ¶ . the President has the power to authorize warrantless national security wiretapping without regard to statutory limitations; n34¶ ¶ ¶ . "the Fourth Amendment does not apply to domestic military operations designed to deter and prevent further terrorist attacks"; n35¶ ¶ ¶ . Miranda warnings are not required for interrogations of detainees by military personnel; n36¶ ¶ ¶ . the Fifth Amendment Due Process Clause and the Eighth Amendment Cruel and Unusual Punishment Clause "do not apply to alien enemy combatants held abroad"; n37 and that¶ ¶ ¶ . the right to counsel does not apply in military commissions. n38¶ ¶ Yoo has been called "the most important theorist of the 9/11 Constitution." n39 His webpage at the Berkeley Electronic Press refers to him as [\*337] "the key legal architect of the Bush administration's response to 9/11" and says he had "an almost unmatched impact on America's fight against terrorism." n40 Indeed, his role in providing the "most sustained intellectual defense" of the Bush administration's policies was so significant that an article in the New York Times Magazine was titled The Yoo Presidency. n41¶ In the humid environment of the Bush OLC, Yoo's theory of presidential war powers flourished like Audrey. n42 In War Powers Yoo spoke of shared powers, designed so that the President and Congress would check each other, n43 even though he concluded that those powers are distributed quite unequally. n44 By 2003 he was declaring:¶ ¶ The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause... . The Framers understood the Commander in Chief clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the military commander... . Any power traditionally understood as pertaining to the executive - which includes the conduct of warfare and the defense of the nation - unless expressly assigned to Congress, is vested in the President. n45¶ ¶ Since leaving the administration, Professor Yoo has continued to press the same arguments in favor of the President's plenary war powers in the academic and popular press, including three books n46 and innumerable op-eds and speeches. He recently proclaimed (inaccurately n47) that the capture and killing [\*338] of Osama bin Laden should be credited to the "tough interrogation" and warrantless electronic surveillance programs of "President George W. Bush, not his successor." n48 One observer commented, "John Yoo taking credit on behalf of the Bush administration for Sunday's strike against Osama bin Laden is like Edward John Smith, the captain of the Titanic, taking credit for the results of the 1998 Academy Awards." n49¶ Most law review authors can only dream of having even a small fraction of the impact on the world that John Yoo's article - written when he was a junior professor at Berkeley Law - has had. And yet the substance of the article has been subjected to comprehensive and devastating criticism. Fifteen years after its publication, and on the centennial of the distinguished journal in which it appeared, it is appropriate to look back on the influence the article has had and the critiques it has prompted, and to ask whether there are lessons here for legal scholars, legal journals, and the use of legal scholarship in policy making.

#### Yoo’s view of presidential war powers relies on a flawed understanding of the Constitution. Yoo wrongly locates warmaking power with the executive: misinterprets “declare war,” ignores a host of expressly authorized roles for Congress, manipulates the understanding of the president’s plenary powers, and point blank is wrong on the British model

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Yoo contends in War Powers that - "contrary to the arguments by today's scholars" n69 - the Constitution does not give Congress the primary power over war and peace. According to Yoo, the Declare War Clause does not grant Congress any power to initiate or authorize war. Rather, the change in wording from "make war" to "declare war" on August 17, 1787 was intended to limit Congress's power to "declaring," or announcing, that the actions already taken by the President amounted to a legal state of war. Yoo argues that this change allocated to the President all the power of "conducting military operations," including the decision to commence and end war. Congress could only affect such decisions through its appropriations and impeachment powers.¶ Yoo contends that the Founders intended to locate all executive power, as it was then understood in Britain, in the Executive except for the powers expressly allocated to the other branches. Thus when the Vesting Clause vests "the executive power" in the President, that includes the full set of powers exercised by the King. Similarly, the Commander-in-Chief Clause grants the President all the powers that had "traditionally" (that is, in Britain and other European countries) been given to a nation's supreme military commander (that is, the King). n70 Additionally, Yoo argues that because Article II vests "the executive power" in the President, whereas Article I vests the legislative powers "herein granted" to Congress, the President has the entire war and foreign affairs power of the nation except that which is specifically enumerated and granted to Congress, whereas Congress's powers are limited to those expressly enumerated.¶ A. The Declare War Clause¶ The centerpiece of Yoo's argument is that "the Declare War Clause does not add to Congress's store of war powers at the expense of the President. Rather, the Clause gives Congress merely a judicial role in declaring that a state of war exists between the United States and another nation ... ." n71¶ 1. Argument from the Text¶ Yoo's primary textual argument is based on the Convention's decision to change "make War" to "declare War." The argument crucially depends on the [\*342] assumption that the power to "declare war" as used in the Constitution is synonymous with the power to make a formal declaration of war - that is, that the Clause grants only the power to issue a formal declaration. This assumption ignores the overwhelming evidence of what the Framers said they were doing, n72 as well as evidence of how the term "declare war" was understood at the time. n73¶ Yoo correctly observes that at the end of the eighteenth century a formal declaration of war was not a prerequisite to entering into war. Though he recognizes that in the eighteenth century war could be initiated either by formal declaration or through action, Yoo assumes that the Convention intended to give Congress only the power to make a formal declaration. He constructs his preferred meaning of "declare war" from eighteenth-century authorities discussing formal declarations of war.¶ This reasoning is circular - it assumes the conclusion. As Michael Ramsey (himself a "textual originalist") demonstrates, the phrase "declare war" meant "initiating a state of war by a public act." n74 War "can be declared either by commencing hostilities as well as by formal announcement" - "by word or action." n75 Ramsey therefore concludes that Congress was to have both powers. Yoo acknowledges that war could be initiated by word or action, but concludes that the Clause refers to only one of these options. This reasoning ignores the fact that both at Philadelphia and in the ratifying conventions delegates used the words "declare" and "make" interchangeably, even after the change from "make war" to "declare war." n76¶ Yoo compounds the error by going on to deny that Congress has any power to commence war at all, even through issuing a formal declaration. He argues that the Declare War Clause gives Congress only a "judicial-like" n77 power to affix a legal label to the actions the President has already taken - "like a declaratory judgment." n78 The President, according to Yoo, has sole control over the decision to go to war. Even the power to "declare war" does not give Congress power to take the nation from peace to war. This conclusion [\*343] is contrary to the historical evidence that "declare war" was also used to mean "commence hostilities," that war could be "declared" by word or action, and that the Framers themselves understood and used the term in this fashion. It also seems highly illogical. As Ramsey points out, it is puzzling that the Framers would give Congress, the deliberative body, the power to announce war and the President, "normally the communicative voice in government," the power to initiate it. n79 Thus the textual argument collapses.¶ 2. Argument from the Convention Debates¶ James Madison's notes reflect that he and Elbridge Gerry introduced the change from "make" to "declare," leaving "to the Executive the power to repel sudden attacks." n80 That is, the President was to be authorized to take defensive action if the nation were attacked. Yoo initially interprets Madison's statement as "at least expanding the executive's power to respond unilaterally to an attack." n81 He then muses that possibly Madison and Gerry "did not explain its meaning to the assembled delegates," or that "perhaps the lateness of the hour - the debate occurred at the equivalent of 5:00 p.m. on a Friday - may have fatigued the renowned note-taker himself." n82 Let us be clear about what is happening here. To stretch the historical record to fit his novel theory, Yoo imagines events for which there is utterly no evidence and then suggests that Madison may not have understood his own amendment.¶ To the contrary, from the records of the Convention "it was clear that the delegates were not referring to a declaration as a formality, but as an authorizing act that no branch but Congress could make." n83 Moreover, Yoo's interpretation is at odds with Madison's consistent opposition to giving the President the power to commence war. Madison believed that those who "conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded," n84 and that "the constitution supposes, what the History of all Govts. demonstrates," that the executive is "the branch of power most interested in war, & most prone to it" and the Constitution "accordingly, with studied care, vested the question of war in the Legisl." n85¶ [\*344] Contrary to Yoo's claim that the Framers reposed extraordinary power in the President because they "were not excessively worried by the prospect of unilateral executive action," n86 a host of Founders "vigorously repudiated the British war powers model" at the Convention because they "were deeply concerned about unilateral executive commitments to war." n87 Fisher quotes James Wilson (who "did not consider the Prerogatives of the British Monarch as a proper guide in defining the executive powers" n88), Alexander Hamilton (the Senate would have the "sole power of declaring war" n89), Edmond Randolph, John Jay, John Rutledge, Charles Pinckney, Elbridge Gerry (who declared that he "never expected to hear in a republic a motion to empower the Executive alone to declare war" n90), Roger Sherman ("the Executive shd. be able to repel and not to commence war" n91), and George Mason (who was for "clogging rather than facilitating war" and against "giving the power of war to the Executive" n92). John Jay made similar statements during the ratification conventions (the King can declare war and raise armies, but the President cannot because "these powers are vested in other hands" n93). Yoo quotes many of these statements, but either dismisses them as unrepresentative, interprets them in accordance with his own views, or suggests possible meanings that seem implausible. A particularly egregious example is the treatment of Wilson's statement that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." Yoo cites this statement for the proposition that the Framers understood that "vesting the President with all "executive powers' would give him the power over war and peace." n94 This claim is diametrically opposed to Wilson's statement, which could not be clearer in stating that the power "of war & peace" is "of a Legislative nature."¶ Perhaps because the debates at the Philadelphia Convention do not support his views, Yoo relies more heavily on statements made at the ratifying conventions. There was little discussion of war powers at the ratifying [\*345] conventions, and the separate state conventions did not discuss the same topics. Moreover, both Federalists and Anti-Federalists frequently misrepresented the document during the ratification conventions in order to obtain votes.¶ Yoo can hardly ignore the statement of James Wilson at the Pennsylvania ratifying convention that:¶ This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large[.] n95¶ Though he acknowledges the statement, Yoo sweeps it aside, concluding that Wilson's views were "exceptional rather than typical" and that "it is perhaps safer just to count Wilson as a dissenter from the prevailing Federalist view on war powers." n96 As Louis Fisher points out, however, "Wilson was far from being a dissenter. He was a leading exponent of the position that, other than presidential actions to "repel sudden attacks,' the whole of the war power is vested in Congress." n97¶ Similarly, Yoo reads Alexander Hamilton, undoubtedly the most vigorous advocate among the Framers for a strong executive, as being staunchly in favor of a monarchical executive, while ignoring his statement that "the models of Locke and Blackstone had no application to America," n98 and that it was up to Congress "to make or declare war." n99 Indeed, Hamilton later wrote that the Constitution¶ provided affirmatively, that, "The Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war, ... in other words, it belongs to Congress only, to go to war. n100¶ Furthermore, Yoo's characterization of the power to declare war as a "judicial" power has no support in any of the statements of the Framers. n101 He simply deduces it from his belief that the Clause refers only to the power to issue a declaration of war.¶ In short, contrary to Yoo's tortured reading of the historical record, there was never "a serious debate over where to locate the power to authorize war. [\*346] Rather, there was impressive harmony and agreement. No member of the founding generation presented a serious argument that the executive should have power to decide when war should be commenced." n102¶ 3. Argument from Presidential Practice¶ Yoo argues that the early presidents acted vigorously in employing military force based on their understanding of the President's primacy in war. He acknowledges that presidential actions after ratification cannot tell us what the drafters thought, but asserts that those actions provide further evidence of how the founding generation would have understood the text.¶ Fisher observes, however, that these same presidents also acknowledged Congress's primary role in war. For example, Washington wrote in 1793 that "the Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure." n103 Jefferson said in 1801, in connection with the Barbary pirates, that he was "unauthorized by the Constitution, without the sanction of Congress to go beyond the line of defense" and in 1805, in connection with conflicts with Spain, that "Congress alone is constitutionally invested with the power of changing our condition from peace to war." n104 Moreover, many of the actions Yoo cites as examples of unilateral presidential action actually had congressional authorization. n105 Indeed, "at no point during the first forty years of activity under the Constitution, did a President or any other important participant claim that Presidents could exercise force independently of congressional control." n106¶ Yoo's argument also ignores relevant Supreme Court decisions. Chief Justice Marshall, a prominent ratifier, wrote for a unanimous Supreme Court soon after the founding that "the whole powers of war [are], by the constitution of the United States, vested in congress ..." and that "it is the exclusive province of congress to change a state of peace to a state of war." n107¶ [\*347] ¶ B. Congress's Other Article I Powers¶ Yoo concedes that Congress does have a role in war. "The Framers intended Congress to participate in war-making by controlling appropriations" n108 and potentially by the use of the impeachment power. n109 Though Congress might use its appropriations and impeachment powers as bargaining chips to put pressure on the President, however, it was to have no other formal war powers.¶ Notably, the argument that Congress's war powers are limited to appropriations and impeachment almost completely ignores other express congressional war powers. Yoo discounts the power to issue letters of marque and reprisal (which authorize private capture of foreign ships or property and retaliation for attacks) by classifying it also as a mere judicial function. n110 And his argument simply ignores n111 Congress's other war powers: to raise and support armies; provide and maintain a navy; make rules for the government and regulation of the land and naval forces; provide for calling out the militia to suppress insurrections and repel invasions; provide for organizing, arming, disciplining and governing the militia; make rules concerning captures on land and water; and define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. n112 All of these powers represent departures from British law and indicate that Congress was to have a central, indeed a primary, role in matters of war.¶ C. The Vesting and Commander-in-Chief Clauses¶ Yoo conjures the President's "plenary" and "inherent" power over war-making from the Vesting Clause and the Commander-in-Chief Clause, n113 powers that, he modestly acknowledges, "at first glance appear somewhat paltry." n114 The Vesting Clause provides that "the executive power shall be vested in a President." n115 As "executive power" is not defined in the Constitution, Yoo reconstructs its meaning by placing it "in the legal context of its day." n116 He contends that the Framers transposed to the Constitution the understanding of executive powers with which they were familiar - the prerogatives held by the British Crown and exercised by the royal governors in the colonies. And because Article II vests "the executive power" while Article I [\*348] vests the powers "herein granted," he concludes that although Congress's powers are limited to those enumerated, the President's powers are residual, consisting of all powers traditionally recognized as executive that were not specifically conveyed to the other branches. By the time of his service in the government, Yoo had extended this argument to maintain that the Vesting Clause conveyed all of the prerogatives appertaining to the British King, excepting only those powers that were expressly given to Congress by Article I (that is, the power to "declare" war, appropriate funds for military activities, and impeach federal officers). n117¶ With respect to the Commander-in-Chief Clause, n118 Yoo contends that it was intended not just to give the President control over the tactics and strategy of military operations, but to convey all of the power over military affairs held by the British King. n119 His analysis fails to consider the remainder of the Commander-in-Chief Clause, which provides that the President is commander in chief of the militia "when called into the actual Service of the United States." n120 It is Congress that has the power to call the militia into service, just as it is Congress that has the power to "raise and support" the armies the President is to command, to "provide and maintain a navy," and to make rules for the government and regulation of the land and naval forces. n121 Yoo's theory places too much weight on the mere phrase "commander in chief," particularly in light of the express powers that are given to Congress. The real basis for Yoo's conclusion is not textual analysis but his conviction that the Framers meant to give the President the same military powers as the King.¶ In his OLC memos, Yoo pressed his unconventional views on the Commander-in-Chief Clause and stated them even more forcefully:¶ It has long been the view of [OLC] that the Commander in Chief Clause is a substantive grant of authority to the President [citing only to a memo from William J. Rehnquist, then head of the OLC, on the Vietnam War and Yoo's own September 25, 2001 memo n122]. This authority includes all those powers not expressly delegated by the Constitution to Congress that have traditionally been exercised by commanders in chief of armed forces. n123¶ [\*349] ¶ D. The British Model¶ The Constitution does not define "the executive power." Rather than looking to the many statements by the Framers - in the Convention debates, the ratifying conventions, The Federalist, and other documents - for evidence of how they used the term and what powers they thought were appropriate to the American Executive, Yoo asserts that "the war powers provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers." n124 The argument for this claim is replete with statements in the subjunctive, such as what - he assures us - the Framers "would have understood" n125 or "would have been familiar" with. n126 He concludes that the Vesting Clause grants the President all of the royal prerogatives of the British King (which he interprets in a pro-Crown manner), n127 except for the power to make a formal declaration of war and the power to fund war.¶ Yoo claims that the Anti-Federalists, who argued against ratification because they thought the Constitution was too monarchical, actually got it right, and understood the Constitution better than its proponents. He asserts that the Anti-Federalists "correctly claimed that the Constitution's system did not deviate all that much from the British Constitution as it existed in practice" and that "indeed, the Federalists appear to have ceded to the Antifederalists the truth of their arguments." n128 He explicitly agrees with the Anti-Federalist characterizations of the Constitution. "Implicit in the Antifederalist attack was an understanding of the British Constitution consistent with the one offered in this Article... . The Antifederalists recognized that Congress would possess the same check on the President that Parliament exercised against the King - the power of the purse." n129¶ It is hard to take seriously an interpretive method that embraces as correct the arguments the Anti-Federalists deployed to try to prevent ratification, and ignores or dismisses the views of the drafters and proponents. The Anti-Federalists did not desire a President who held royal prerogatives - they wanted a weaker national government. And the Federalists consistently wrote and spoke of giving Congress, rather than the President, the power over war and peace. If Yoo's views really had been the shared understanding of "executive power" in 1787-89, the Constitution would never have been ratified, because no one desired to have another King. n130¶ [\*350] Yoo's reading of the historical materials does not give adequate weight to the Framers' complicated attitudes toward executive power. The Framers had learned from their experience with the Articles of Confederation that a stronger national government was necessary, one that possessed both a robust legislature with far greater powers than the Continental Congress and a separate executive able to act with greater "energy," as well as an independent judiciary to provide a check on the legislative and executive branches. But it had been little more than a decade since the Framers had thrown off the onerous executive powers of the King and his royal governors, and they did not desire to replicate them in the new government. n131 "Yoo's theory ignores the great efforts expended in the Revolutionary era to free the United States from the excesses of executive power experienced" during the colonial period. n132¶ Yoo claims that there was a consensus among the founding generation that the new government would "follow[] in the[] footsteps" n133 of the British model, and that the relationship between Congress and the President would parallel that between Parliament and the King. But the assumption that the Constitution embodied the views of Blackstone, Locke, and Montesquieu is unwarranted. n134 Streichler rightly comments that despite the "general proposition that the Constitution's framers operated within the Anglo-American political tradition," it would be inappropriate "to conclude that particular powers exercised by the king, like the power to decide on war, were granted to the President because they were with the Crown. After all, the American Constitution expressly allocated several of the monarchy's war powers to Congress, including the power to declare war." n135¶ The Framers made it clear that they consciously and deliberately rejected the British constitutional model, particularly with respect to the powers of war and foreign affairs. For example, Edmund Randolph called executive power the "foetus of monarchy" and declared that the delegates "had no motive to be governed by the British Governmt. as our prototype" because the "fixt genius of the people of America required a different form of Government." n136 James [\*351] Wilson, who drafted the Vesting Clause for the Committee of Detail, said he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive power," n137 especially because the power "of war & peace" was "of a Legislative nature." n138 Hamilton, in The Federalist No. 69, contrasted the King's power as a hereditary monarch having the power not only to command troops but also to declare war and to raise and fund fleets and armies "by his own authority" with the President's limited power, which would "amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy," with Congress holding the right to declare war, raise, regulate, and fund armies. n139¶ Yoo quotes this passage from Hamilton, but to discredit it he first scoffs at Hamilton's description of the President's power ("a second-rate King") and goes on to state that The Federalist No. 69 was not "the authoritative explanation of the Constitution." n140 Yoo declares that Hamilton "carefully avoided explaining whether the formal powers transferred from King to Congress were actually significant." n141 He characterizes Iredell's similar distinction between the powers of the President and the King, at the North Carolina ratification convention, as "overdrawn." n142¶ In short, contrary to Yoo's theory, the evidence shows that the Framers "rejected the English Model - the monarchical model" because of their "deep aversion to an unrestrained, unilateral executive power ... ." n143 As Louis Fisher put it, to interpret the debates as giving the President the power to commence war¶ would defeat everything that the framers said about Congress being the only political body authorized to take the country from a state of peace to a state of war. The president had the authority to "repel sudden attacks" - defensive actions. Anything of an offensive nature, including making war, is reserved only to Congress. n144¶ [\*352] In the end, the most telling critique of War Powers may simply be that its conclusions are completely at odds with what we know of the purposes and concerns of those who wrote and ratified the Constitution. n145 Michael Ramsey, himself an originalist, puts a provocative twist on this idea, suggesting that originalists will not be persuaded by Yoo's argument because it "simply drifts too far from the Framers' expressed understandings of their own text, and from the historical meanings of the words they used," but that "evolving constitutionalists" will have a harder time refuting Yoo's arguments because their interpretive theories rely on policy judgments that are less subject to falsification. n146

#### While we could use the rest of this time to speak to the effect of the Yoo Doctrine on the war on terror and status of the constitution, this article’s rise is perhaps more notable because of what it says about the status of deliberation in the academy. More specifically, how it speaks to the status of deliberation in this community. The reason Yoo was able to emerge as the leader of the 9/11 constitution is because his work was insulated from criticism as a result of the academic process in which his arguments emerged.

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 08 [Robert J., The Law: Saving the Presidency from Lawyers, Presidential Studies Quarterly, June, Proquest, access 8-30]

Legal training is well suited to prepare lawyers for the study and practice of law in the advocacy-based legal system. But when lawyers as academics enter the realm of constitutional law, legal training offers poor preparation for academic analysis. Worse, the vast realm of legal publishing-law reviews-is run by students who do not rely on peer review, unlike every other academic discipline. The result of these two factors is great potential for wayward constitutional theorizing, which has adverse consequences not only for academic constitutional debates but also for political debate and policy outcomes. This article examines two cases in which lawyer-made theorizing has deformed constitutional meaning pertaining to the presidency: the inherent item veto and the unitary executive view of the commander-in-chief power.¶ The second Bush presidency has made at least one major contribution to the study of the presidency: It has put the lie to the notion that constitutional powers and institutional relations are less than central to the contemporary presidency and to any methodology selected to study that institution. After all, the George W. Bush presidency's overarching goal and master plan, spanning the gamut of routine day-to-day activities, on the one hand, to the administration's most important policy goals, on the other, has been to define and redefine the president's constitutional powers consonant with its singularly expansive view of the office.¶ The Bush administration's unceasing effort to recast Article II, including such activities as the prolific use of signing statements to rewrite legislation, expansive claims of executive privilege, unbounded declarations of secrecy spanning every manner of presidential (and vice presidential) action, warrantless wiretapping, war powers claims, the detention of suspects related to external threats, among other actions, all ride on express constitutional claims made by the administration. While the substance of these claims is, at the least, open to dispute, George W. Bush is no Neustadtian president seeking to buttress puny formal powers by marshaling his persuasion skills to strike bargains with Congress or the bureaucracy.¶ Baby, the new institutionalism is back, and lawyers are leading the charge.¶ The central role played by lawyers in the institution of the presidency is nothing new, nor is it unique to the Bush administration or to governance itself. But given that the Bush administration is seeking a new class of constitutional (as distinct from political) powers, it needs more than a political justification. It needs to be able to make a plausible structural argument. In the case of his prosecution of the war on terrorism, for example, Bush argues partly from necessity. But he also argues vehemently that his reading of his Article II commander-in-chief powers not only allows him to take any action he deems necessary for the security of the country, but also that Congress may not legislate to circumvent those powers as he defines them and that the courts may not adjudicate any challenge to them (Spitzer 2006). When Bush's claims to constitutional powers are married with another trait-adherence to the constitutional doctrine of "original intent"-then the role of lawyers becomes not only important but vital. It is, after all, central to modern conservatism that contemporary governmental actions should conform to an originalist view of the Constitution; that is, the modern exercise of powers should hew closely to a narrow or strict interpretation of the Constitution, and the founders' intent behind it, as it was contemplated in 1787. The opposing "living Constitution" perspective, expressing the view that the Constitution should be interpreted to conform to contemporary problems, is anathema. Yet to return to Bush's expansive view of Article II commander-in-chief powers, it certainly seems at first glance to conform more closely to a living Constitution view, not an originalist view. The solution to this conundrum-that is, to behave according to the tenets of a living Constitutionalist while claiming originalist pedigree-is to construct or stitch together a constitutional justification that has the appropriate provenance. The ideal facilitators for such an enterprise are lawyers; the ideal venue for such an activity is law reviews.¶ My argument, in a nutshell, is that legal training and law reviews are a breeding ground for wayward constitutional theorizing; in the case of the presidency, legal academic analysis has provided critical scholarly legitimacy for at least some of the ideas that have flowered in the current Bush administration (although this phenomenon is limited neither to the presidency nor to the current administration). Legal training, including the adversarial process, advocacy, and client loyalty, are well suited to the American system of justice, in which opposing, one-sided arguments collide to produce a just outcome. By its nature, the adversary process often has the effect of giving the presentation of truth a lower priority, as winning the argument becomes the most important goal. When these principles are applied to scholarly analysis of constitutional matters, the all-too-frequent result is selective analysis, overheated rhetoric, overstated conclusions, and distortion of facts and concepts. Such wayward theorizing too easily finds its way into print in the nation's more than 600 law journals, where, unlike every other academic discipline, the professional publications are run by law students, not faculty or other trained professionals, and peer review is almost never used to determine publication worthiness.¶ I am not the first to observe the traits described here.1 In a recent essay on the relationship between law, legal analysis, and the study of presidential power, Kenneth Mayer observed that "the legal literature . . . often incorporates simplistic or highly stylized conceptions of politics and government, and legal analyses often do not meet the standards of good social science research" (2004,13). Mayer's verdict has found empirical confirmation in the work of Lee Epstein and Gary King, who authored a landmark article (published in a prominent law journal) in which they examined the methodological soundness of empirically based law review articles. Their study included a reading of every article published in law journals from 1990 to 2000 in which the word "empirical" appeared in the title-231 articles in all. They found that, without exception, every article they examined violated at least one principle of sound empirical research, leading them to conclude that "serious problems of inference and methodology abound everywhere we find empirical research in the law reviews and in articles written by members of the legal community" (Epstein and King 2002, 15). Epstein and King argued, too, that at least part of the problem arises from the nature of legal education and training. They noted "the markedly different goals" of lawyers as compared with academics of other disciplines: "While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence against his or her theory, an attorney is taught to amass all the evidence for his or her hypothesis and distract attention from anything that might be seen as contradictory information" (9). They further noted that "lawyers and judges, and hence law professors, specialize in persuasion. Lawyers need to persuade judges and juries to favor their clients, and the rules of persuasion in the adversary system are different from the rules of empirical inquiry" (9 n.23).

#### This process might work for the courtroom but in terms of the Constitution it is anti-deliberative

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 11 [Robert J., “Still Saving the Constitution from Lawyers: A Response,” Gonzaga Law Review, http://www.law.gonzaga.edu/law-review/files/2011/01/Spitzer.pdf]

The primary argument of my book is, as the consciously provocative title and ¶ subtitle say, that law reviews are a breeding ground for wayward constitutional ¶ theorizing. Why? Three key reasons: first, law school training prepares its graduates¶ well for the practice of law, but poorly for academic research.3¶ I believe this to be ¶ true because legal training, by its nature, emphasizes traits invaluable to the ¶ courtroom—zealous advocacy, aggressive argument, client loyalty, the honing of ¶ persuasive skills—but inimical to academic inquiry. The research and analytical ¶ skills central to law are valuable in any endeavor, including academic research and ¶ writing, but they are counterbalanced by other aspects of legal training and practice. ¶ Thus, these traits produce far too much law journal writing that offers selective ¶ analysis, cherry-picked evidence, overheated rhetoric, factual distortion, and ¶ conclusions that outrun evidence. These traits are squarely at odds with the principles ¶ of inquiry, and the type of writing, found in literally every other academic ¶ discipline—from anthropology to zoology—including the philosophy of science, the ¶ scientific method, hypothesis testing, and other research methodologies that embody ¶ the principles of intellectual inquiry (research methodology is generally not taught in ¶ law schools4¶ ).¶ The second problem with legal writing is its venue, law reviews.5 Virtually all of ¶ the nation‟s law reviews are run by law students, not by academics or other ¶ professionals; moreover, publication decisions, with the rarest exceptions, do not ¶ employ the universally accepted gold standard for publication in every other ¶ academic discipline: namely, peer review (meaning that manuscript review is given ¶ over to people who have demonstrated, usually through their own research and prior ¶ publications, knowledge and expertise in the subject matter of the manuscript being ¶ reviewed). In contrast, the decision to publish in law reviews is given over entirely to ¶ a cadre of people who, though intelligent, diligent, serious, and hard-working, do not ¶ possess, and cannot be expected to possess, the expertise necessary to judge a piece ¶ of work on its merits. Work not judged on its merits cannot be assumed at face value ¶ to be meritorious. ¶ The consequence of these two traits, combined with the sheer size of the law ¶ review publishing hole (in all, there are over 850 publications attached to America‟s ¶ law schools6¶ ), is that any and every sort of writing on any and every imaginable ¶ subject can find a publishing venue. The problem, as I discuss in my book, is not that ¶ there is no limit to superb writing, but that there is no floor to the insidious, the¶ incompetent, the inane.7¶ It would be astonishing, in fact, if defective constitutional ¶ and other theorizing did not arise from the conditions I describe.8

#### Perry Mason scholarship undermines inquiry – bias-driven results infect policy and constitutional outcomes in the real world

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 13 [Robert, “What's Old Is New Again: Political Science, Law, and Constitutional Meaning,” PS, Political Science & Politics46.3 (Jul 2013): 493-497., proquest]

THE PERRY MASON SCHOLAR?¶ The purpose of legal education is to produce lawyers prepared and able to function effectively within the framework of the American legal system. As is well known, the central tenet of American justice is the adversarial system. A practicing lawyer is an advocate, predicated on the belief that the best way to determine an approximation of the truth--or at least a relatively just outcome--is for opposing sides to present their strongest possible arguments to an impartial arbiter. One may well argue that America's adversarial legal system is well suited to American law and tradition, and that it is an effective means to produce a just outcome in a legal setting.¶ Although the adversary system, client loyalty, lawyer-client privilege, and zealous advocacy are well suited to the courtroom, they are poorly suited to academic and scholarly inquiry. The lawyer's foremost obligation is to the client, not the truth. Truth-telling is not the primary goal. That does not mean it is allowable to lie, but lawyers may, for example, encourage a fact-finder to reach a wrong conclusion to effectively defend the client. And the lawyer's emphasis is persuasion on behalf of the client, not a neutral presentation of facts. A century ago, the noted legal scholar Roscoe Pound (1906) likened a strenuous legal defense to a sporting event where the primary goal is to win the contest. That analogy to the legal profession is, if anything, even more apt today.¶ In the scholarly world, the client is not an accused criminal, but an idea or an argument. Yet legal academic writing is rife with Perry-Mason-like defenses of ideas that stretch arguments, disfigure or ignore facts, cherry-pick evidence, draw in distractions, and use overheated or inflammatory rhetoric found in no other academic discipline. These tactics may be fine in the courtroom where the goal is to persuade, and where the opposing legal counsel is present to rebut, but it is deceptive, even dangerous, in the academic world. For example, lawyers are under no obligation to introduce evidence that undercuts their case--yet academics have an obligation to not only introduce contrary evidence, but to treat it with equal, even greater respect and care than their own cherished ideas. This is, in fact, a bedrock principle of all academic inquiry. As one legal writer noted, "Scholarship ... aims at the truth. Advocacy, by contrast, is concerned merely with persuasion" (Kronman 1993, vii).¶ Historians have railed against legal writers' suspect treatment of history at least since the 1960s, labeling it, derisively, "law office history." (Kelly 1965, 122) Legal writers have responded to defend what they have counter-labeled, "advocacy scholarship." But the problem is that this phrase is an oxymoron. Advocacy surely has its place in academic writing, but not masquerading as conventional scholarship. Epstein and King (2002, 9) describe the problem this way: "While a PhD is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence against his or her theory, an attorney is taught to amass all the evidence for his or her hypothesis and distract attention from anything that might be seen as contradictory information."¶ Without question, there is much excellent law journal writing, just as there are legal scholars who adhere scrupulously to scholarly standards of research and writing. The difficulty, however, is not that excellent scholarship is not to be found in law journals, but rather that there is no minimum standard for writing that only masquerades as scholarship. Some of this writing has produced entire bodies of constitutional theorizing that are astonishingly, jaw-droppingly, patently false. Even so, this theorizing wins credence precisely because the legal profession is granted great deference when it comes to matters of constitutional interpretation. Such writing influences national legal debate and thinking, as well as judges, legislatures, and executives (including the presidency), and public policy. In other writing, I provide very detailed evidence of these assertions in three examples where defective law journal writing has promulgated wayward constitutional theorizing built on such law journal writing, pertaining to the presidential veto power, the president's commander-in-chief power, and the Second Amendment's right to bear arms (Spitzer 2008a, 2008b). Space limitations prohibit an exploration of these three cases here.

#### Status quo constitutional interpretative methods ensure the power of the conservative legal movement. Political science solves.

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 13 [Robert, “What's Old Is New Again: Political Science, Law, and Constitutional Meaning,” PS, Political Science & Politics46.3 (Jul 2013): 493-497., proquest]

If the last decade of presidential politics has demonstrated anything, it is that public law is not only important, but essential, as a frame for understanding the institution. From the Unitary theory of executive power (Barilleaux and Kelley 2010; Fisher 2010b), to the expansive use of presidential signing statements (Cooper 2005; Kelley 2007), to presidential "czars" (Sollenberger and Rozell 2012), to executive orders and other types of direct executive action (Cooper 2002; Howell 2003), to executive privilege (Fisher 2004a; Rozell 2010), to the presidential veto (Spitzer 1988; 2012), to war powers (Fisher 2004b), recent presidents have doubled down on constitutional and legal bases for their actions. The well-worn Richard Neustadt (1990) view of presidential power emphasizing the pivotal role of presidential bargaining and informal powers as central to presidential success, while far from irrelevant, seems naively quaint by comparison with contemporary, muscular public law-based presidential actions. As Fisher (2009, 813) has written, "More important than how much presidents do something, or why they act as they do, is the source of their authority and limits to it. The president is part of a constitutional system and cannot, or should not, be isolated from it."¶ Anticipating these arguments by two decades, Theodore J. Lowi (1992, 6) was prescient (if more sharp-tongued) in his verdict on what only later became known as the Unitary theory of executive power: "The far right-wing intellectuals are also writing a significant proportion of the new work on the founding intended not only to contribute to historical scholarship but to reconstitute the constitution in such a way as to place the presidency above the law and affirmative action beneath it." Whether he knew it or not, the writing to which Lowi referred was born and grown in the hot-house of law reviews (Spitzer 2008b, 92-98).¶ Political science is by no means absent from important scholarly debate over matters of constitutional law; indeed, a public law renaissance is occurring in our discipline--and certainly in the study of the presidency--just as it is in our polity. But the primary academic player in these debates has been the legal community, and that alone punctuates not only the necessity, but the urgency, that political science resume its key role in this long-neglected field. We would all do well to follow Louis Fisher's example.

#### Academia key to the rise of Yoo and sustains his ideology in governance

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 13 [Robert, “What's Old Is New Again: Political Science, Law, and Constitutional Meaning,” PS, Political Science & Politics46.3 (Jul 2013): 493-497., proquest]

LAW REVIEWS AND YOO¶ In his abundant writing, Fisher (2006, 1234-44; 2011) has encountered and confronted the phenomenon described here. For example, Fisher has written significantly and insightfully on the related subjects of the Unitary theory of executive power and the impact of University of California law professor John Yoo's writings on presidential power and national security (e.g., Fisher 2000, 1658-68). Yoo is most well known as the author of the so-called torture memos while working in the White House of George W. Bush from 2001 to 2003, as well as other memoranda advancing a highly aggressive view of executive power in foreign affairs that served as the administration's road map to executive power until the memoranda were later modified and withdrawn (Baker 2006, 29-30; Fisher 2006, 1242-44). Less well known is the fact that Yoo (1996) earlier authored a highly influential law journal article that first laid out this very expansive view of presidential power in foreign affairs. This article was not only the wellspring of his subsequent writings both in the Bush administration and in his subsequent return to academic life; it also catapulted Yoo's influence in the Bush administration. By one account, Yoo's "academic background and interests," (Golden 2005) in particular his law journal writing on presidential power and foreign affairs, allowed him to bypass the normal clearance process in the Bush White House to and through which opinions from the Office of Legal Counsel, where he worked, would otherwise normally have been subject (Mayer 2005). Bush Attorney General John Ashcroft was not consulted about these early decisions and "was enraged to discover that Yoo, his subordinate, exercised such influence." 8Indeed, Yoo "became the theorist of an insurrection against legal limits on the commander in chief." (Gellman and Becker 2007) As Fisher shows, the scholarly dignity accorded to Yoo was unwarranted.¶ For example, Fisher takes the California Law Review (considered one of the nation's premier law journals) to task because its student editors were unqualified to examine, much less challenge, key assertions in Yoo's 1996 article, such as his categorical (and easily falsifiable) claim that, according to the Constitution's founders, "the courts were to have no role at all" (Fisher 2011, 181) in adjudicating war powers and foreign relations cases, even though the courts did adjudicate several war powers cases as early as from 1800 to 1806, for example (and many thereafter). More generally, Fisher assails Yoo's central contention that the American presidency was modeled after the British monarchy, when, as Fisher and many others have demonstrated, the Constitution's framers emphatically rejected monarchical executive prerogatives as the model for the presidency. Other tenets of Yoo's views of executive power stemming from his law review writing have been similarly found wanting (Spitzer 2006; 2008b, 103-08). Whether published in the California Law Review or virtually any of the nation's other such publications, the problem is the same: the articles found therein were and are not subjected to the (admittedly imperfect) scholarly rigors attached to the publications found in literally every other academic discipline. Absent such review, the door to constitutional invention and distortion is wide open. And even though Yoo's arguments have been undermined by many specialists in the field, they survive in the world of governance, in part at least because of the imprimatur conferred by the legal academy. As one account noted during the 2012 presidential elections, advisors close to Republican presidential candidate Mitt Romney recommended to him that, if elected president, he repeal Barack Obama's executive orders that repealed Bush-era executive orders that authorized and justified torture--in other words, to reactivate Yoo's theories of hyper-expansive presidential powers (Savage 2012).

#### Therefore we stand in affirmation of the 2013-14 Cross Examination Debate Association’s resolution, “Resolved: The United States Federal Government should substantially increase statutory and/or judicial restrictions on the war powers authority of the President of the United States in one or more of the following areas: targeted killing; indefinite detention; offensive cyber operations; or introducing United States Armed Forces into hostilities,” as a response to Yoo and the OLC.

#### Voting for the affirmative is the academic’s burden. We must use this moment to laugh at Nixonian claims of the inherent legality of presidential action.

Spitzer, Distinguished Service Professor of Political Science at the State University of New York at Cortland, 08 [Robert J., The Law: Saving the Presidency from Lawyers, Presidential Studies Quarterly, June, Proquest, access 8-30]

My argument is neither so naive, nor presumptuous, as to suggest that the Bush administration's aggressive power claims would not have occurred had it not been for John Yoo's article. But in American politics and governance, the provenance of power assertions is no little matter. And after all, strong arguments can and have been made, long before the second Bush presidency, that the president should exercise commander-in-chief powers more broadly, based on some combination of prerogative powers, strategic necessity, political consensus, and historical evolution of an office (and a nation) that has undergone dramatic growth and change in 200 years. One of the most vigorous proponents of the strong presidency in the twentieth century, Clinton Rossiter, epitomized the combination of a realistic view of founders' intentions with unabashed preference for the modern strong presidency. "The framers of the Constitution," Rossiter observed, "to be sure, took a narrow view of the [commander-in-chief] authority they had granted" (I960, 22). Yet he also understood and approved of presidential efforts to enlarge the commander-in-chief power: "We have placed a shocking amount of military power in the President's keeping, but where else, we may ask, could it possibly have been placed?" (23). Writing more recently about the war power, David Mervin conceded that the standard view of the commander-in-chief power recognizing Congress's pivotal role and powers as defined in the Constitution "is broadly correct" (2000, 770-71; see also Kassop 2006; Pious 2006). Yet, he continued, "there are grounds for questioning how far those original aims should continue to control constitutional interpretation." After all, "the framers, for all their undoubted wisdom, got some things disastrously wrong by modern standards."¶ It is beyond dispute that both the United States and the office of the presidency are profoundly different in the twenty-first century than in the eighteenth, and that the demands of modern political reality necessitate a considerably expanded executive power. The modern separation-of-powers arrangement is not the legislative-centered system it was in the late eighteenth and early nineteenth centuries. It is also a truism that the constitutional system has survived for this long a period of time largely because it has been flexible enough to adapt to changes that no one could have anticipated in 1787.¶ Yet none of these arguments for a strong executive justifies the invention of a fictionalized constitutional past. The desire to mold constitutional, originalist understandings to fit contemporary political needs is understandable but reprehensible. The first job of academic scholars is to make every effort to get it right. The abiding concern is that legal training encourages deceptive constitutional arguments and that law journals make it far too easy for writing that possesses the form, but not the content, of scholarship to get it wrong.¶ In the case of the Bush administration's views regarding the commander-in-chief power, they are of immediate significance not only for that administration's actions and decisions but also because they may be cited by future administrations to justify subsequent actions and theories not otherwise supported by past arguments or precedent. The history of the presidency is littered with examples of such precedent-based justifications.¶ Conclusion: From Law Journal to Law¶ The significance of these views extends in two other directions. One occurs when the policy's architects become decision makers and law school faculty. Jay Bybee, for example, a chief author of several internal Bush administration power assertion documents when he served as head of the Justice Department's Office of Legal Counsel, is now a federal judge on the U.S. Court of Appeals for the Ninth Circuit, a vantage point from which he may well have the opportunity to apply the views he helped construct. And though he did not serve in the second Bush administration, Supreme Court Justice Samuel Alito was elevated to the high court by Bush and is similarly positioned to ratify the suspect unitary theory he helped construct as a young Justice Department lawyer in the 1980s. Lawyers joining law school faculty have been and will be well positioned to advance these arguments in the classroom and in publications.¶ The other direction is public debate and public policy. A one-sided lawyer's brief that morphs into the government's legal position and, in turn, becomes policy describes a policy process built on an inadequate foundation and false pretenses. Former State Department policy advisor during the second Bush presidency and executive director of the 9/11 Commission, Philip Zelikow, offered a stern warning about this very subject in a 2007 law school presentation. In his paper, Zelikow analyzed the Bush administration's response to the 9/11 attacks by arguing (with evident sympathy to administration actions) that its new approach to terrorism, while "fundamentally sound," was also "developed and implemented in a flawed manner" and that these flaws were magnified because of "the role that law and lawyers played in framing policy choices." Himself a lawyer, Zelikow criticized the administration's reliance on lawyers who were assembled to "consider and approve the legality" of actions the administration had already decided to take to fight the war on terror. In other words, a political and policy debate "became framed as a legal debate. Legal opinions became policy guides." Worse yet, in Zelikow's words, "The legal defense then became the public face of the policies. " This was deeply problematic because it circumvented the normal policy vetting processes that a presidential administration might otherwise use to arrive at policy decisions. Instead, the lawyers chosen to justify and ratify the second Bush administration's policy decisions did what lawyers do for their clients: prepare the equivalent of briefs to justify the actions and preferences of the client. These legal opinions were used "to provide formal policy cover for Agency [i.e., CIA] operations. . . . Thus the public debate was decisively framed and deformed." A further problem, according to Zelikow, is the fact that lawyers are not normally taught moral reasoning. Therefore, problems are framed "less as a detailed analysis of what should be done, and more as a problem of what could be done." No wonder the Bush administration found itself defending policies pertaining to such matters as justifications for torture, rendition, and prisoner detention that seemed plainly illegal, politically corrosive, and strategically unnecessary. As Zelikow concluded, the processes that unfolded in the second Bush administration were "developed and implemented in a flawed manner" because of "the way law and lawyers were used to rationalize the policy and frame the debate." Another recent critique of the second Bush presidency charges that "[government lawyers have become instruments by which fundamental constitutional principles are eroded." Bush's lawyer-driven constitutional blueprint has pushed the nation's government "to a monarchical vision . . . with a correlative neutering of the Constitution's checks and balances" (Schwarz and Huq 2007, 187).¶ When former President Richard M. Nixon offered as a justification for his involvement in the Watergate scandal the excuse that, "[w}hen the president does it, that means that it is not illegal" (Cutler 1990, 614), no one accepted that statement as a serious or valid legal (much less constitutional) defense; in fact, Nixon's pronouncement was received with little more than guffaws. Yet the law journal writings on the commander-in-chief power have succeeded in constructing a constitutional edifice around Nixon's statement. And no one is laughing now.