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The War in Iraq: Legal and Political Fallacies

Louis Fisher •

President George W. Bush went to war against Iraq by claiming that Saddam Hussein possessed weapons of mass destruction. They were never found. Investigations since that time have highlighted a number of false claims by the administration, but the errors were not merely those of executive officials. Members of Congress failed to discharge their duties as an independent branch, and the media and many academics added to the hype for war. Both political parties have contributed to presidential wars. In the years after World War II, one finds a string of misconceptions and false claims by Democratic administrations to foster wars. These institutional failings have done great damage to the US constitutional system, the functioning of representative government, democratic values, and the fundamental principle that the decision to go to war against another country is reserved to Congress, not the president.

The initiation of US military operations in Iraq in March 2003 flowed from a long list of miscalculations, false claims, and political misjudgments. War could have been delayed, perhaps permanently, had the principal participants

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performed their responsibilities with greater care, thought, and integrity. Serious misjudgments, however, came from officials in the Bush administration, members of Congress, the media, and academics. One should not write this off as mere "mistakes." It is possible to make a mistake inadvertently, as when one dials the wrong phone number. In sharp contrast, the errors of Iraq were conscious, calculated, and orchestrated.

Although this article focuses largely on Republican Party miscalculations that produced the Iraq War in 2003, the larger purpose is to explain how military operations after World War II—by both political parties—have violated fundamental constitutional principles. Legal and political errors by Democratic presidents are evident in the wars against North Korea (President Harry Truman), North Vietnam (President Lyndon B. Johnson), and the Serbs in 1999 (President Bill Clinton). Republican neoconservatives beat the drums for war against Iraq, but Democratic academics did the same for Korea. A dominant theme in American foreign policy since World War II is a bellicose spirit that champions the use of military force and demeans opponents of war as unpatriotic and unmanly. The costs have been heavy for both political parties, the victims of American wars, and constitutional values of democratic government.

1. The US Constitution Prohibits Presidential Wars

Given the dominant power of presidents over the past half century and their commitment to military action, it may seem that the US Constitution supports their authority to go to war. It does not. The Constitution was intended to *prohibit* presidential wars. This point becomes clear by examining the framers' rejection of the British war model, the express language of the Constitution, and statements made by framers who explained why they opposed presidential wars.

British precedents, on which the framers relied so extensively in many areas of law, assigned all of external affairs to the king: declaring war, raising armies and navies, making treaties, appointing ambassadors, and issuing letters of marque and reprisal. Letters of marque authorized private citizens to engage in

military actions; reprisals are small wars. All of those powers were centered in the king by such writers as William Blackstone and John Locke.[1]

Examine the US Constitution and you will not find a single one of those powers vested in the president. The powers to declare war, raise armies and navies, and issue letters of marque and reprisal are placed exclusively in Congress. The powers to make treaties and appoint ambassadors are shared between the president and the Senate. Thomas Jefferson expressed his satisfaction with this division of power: "We have already given in example an effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[2]

The framers rejected the British model because of their strong commitment to self-government. Citizens would rule through elected representatives and a system of one branch checking another. Citizens did not need aristocracy or monarchy. To assure public control, the decision to go to war against another country was vested in Congress, the branch closest to the people. At the Philadelphia Convention in 1787, where the delegates drafted the Constitution, Pierce Butler wanted to give the president the power to make war. He argued that the president "will have all the requisite qualities, and will not make war but when the Nation will support it." Not a single delegate supported Butler.

Roger Sherman insisted that the president should be able "to repel and not to commence war." Elbridge Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war." George Mason spoke "against giving the power of war to the Executive, because not <safely> to be trusted with it; . . . He was for clogging rather than facilitating war."[3] In Pennsylvania, at the ratifying convention, James Wilson voiced the prevailing confidence that the American system of checks and balances "will not hurry us

1. William Blackstone, *Commentaries on the Laws of England*, vol. 2 (1803), 238–62; John Locke, *Second Treatise on Civil Government* (1690) §§ 146–48.

2. Julian Boyd, ed., *The Papers of Thomas Jefferson*, vol. 15 (Princeton: Princeton University Press, 1958), 397.

3. These quotes and other references to the framers' intent come from the first chapter of my book, *Presidential War Power*, 2d ed. (Lawrence: University Press of Kansas, 2004). For the debates on the war power, see Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 2 (New Haven: Yale University Press, 1937), 318–19.

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."[4]

Why did George Mason say that it was not "safe" to trust the president with the war power? That understanding came from studying other governments and the many disastrous wars initiated by kings and monarchs. The framers understood that executives, in their search for fame and glory, had a dangerous appetite for war.[5] John Jay, whose political experience lay with foreign affairs and executive duties and who served as the first Chief Justice of the Supreme Court, warned in Federalist No. 4 that "nations in general will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."[6]

Under Article II of the Constitution, presidents have the title Commander in Chief. Unlike the interpretations offered by some advocates of executive power, this title never gave the president the authority to take the country to war. Instead, it was limited to two purposes. One was to promote unity of command. The framers wanted the accountability that comes with a single person in charge of military operations. The second purpose was to assure civilian supremacy. In time of war, control was not to be transferred to generals and admirals.[7] Nothing in the Commander in Chief Clause contemplated that presidents may initiate offensive wars against other nations.

The framers underscored their concerns about presidential wars. In 1793, James Madison called war "the true nurse of executive aggrandizement. . . . In

4. Jonathan Elliot, ed., *Debates in the Several State Conventions on the Adoption of the Federal Constitution,* vol. 2 (Washington, DC: 1836–45), 528.

5. William Michael Treanor, "Fame, the Founding, and the Power to Declare War," 82 *Cornell Law Review* 695 (1997).

6. Benjamin Fletcher Wright, ed., *The Federalist* (Cambridge, MA: Harvard University Press, 1961), 101.

7. Fisher, *Presidential War Power,* 12–14.

war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace."[8] Five years later, in a letter to Jefferson, Madison emphasized that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."[9]

Those who advocate strong presidential powers usually look to Alexander Hamilton for support. However, Hamilton shared with the other framers the understanding that the decision to go to war was vested in Congress, not the president. In his "Pacificus" writings in 1793, Hamilton wrote that the president was to keep the peace and Congress had the exclusive authority to make war: "While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the 'executive power' to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign Powers." Hamilton found in this distribution of authority "the wisdom" of the Constitution. "It is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war."[10]

2. The Record from 1789 to 1950

The values promoted by the framers were honored for a century and a half. Presidents could take certain actions of a defensive nature—to repel sudden attacks—but any offensive action against another country was reserved to

8. Gaillard Hunt, ed., *The Writings of James Madison*, vol. 6 (New York: G. Putnam's, 1906–1910), 174.

9. Ibid., 312.

10. "Pacificus No. 1," June 29, 1793, reprinted in *The Works of Alexander Hamilton*, vol. 4, ed. Henry Cabot Lodge (New York: G. Putnam's, 1904), 443.

congressional deliberation and judgment. Writing in 1793, President George Washington said that any offensive operations against the Creek Nation must await congressional action: "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."[11] His Secretary of War, Henry Knox, informed Governor William Blount that Congress had decided to avoid war with the Creeks: "Congress alone are competent to decide upon an offensive war, and congress had not thought fit to authorize it."[12]

The standard here for internal wars against Native Americans applied fully to wars against outside nations. When President John Adams decided it was necessary to use military force against France in 1798, he submitted the matter to Congress and awaited statutory authority. Similarly, President Jefferson took certain military actions against the Barbary pirates in the Mediterranean in 1801, but later reported to Congress that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." When conflicts arose between the United States and Spain four years later, he said that "Congress alone is constitutionally invested with the power of changing our condition from peace to war."[13]

Federal courts had the same understanding about the war power. In 1801, Chief Justice John Marshall observed: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."[14] *That body alone.* A federal circuit court in 1806 repudiated the idea that the president could authorize military adventures abroad: "it is the exclusive province of congress to change a state of peace into a state of war."[15] *Exclusive.* As President James Polk did with Mexico, presidents could move US troops into disputed territories to

11. John C. Fitzpatrick, ed., *The Writings of George Washington*, vol. 33 (Washington, DC: Government Printing Office, 1931–44), 73.

12. Clarence Edwin Carter, ed., *The Territorial Papers of the United States*, vol. 4 (1936), 389.

13. Fisher, *Presidential War Power*, 23–26, 32–34.

14. *Talbot v. Seeman*, 5 US 1, 28 (1801).

15. *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (No. 16,342) (C.C.N.Y. 1806).

provoke military action, but Polk never claimed that he could go to war on his own. He needed to come to Congress, which could decide that war was necessary or that non-military, diplomatic options should be pursued. Congress opted for war.[16] That choice lay with the legislative, not the executive, branch.

All three branches understood that only Congress could authorize war against another nation. In 1863, the Supreme Court upheld a blockade that President Abraham Lincoln had placed on the South during the Civil War. Justice Robert Grier emphasized that the president as Commander in Chief "has no power to initiate or declare a war against either a foreign nation or a domestic State."[17] During oral argument, the attorney representing the White House took exactly the same position. Richard Henry Dana, Jr. conceded that Lincoln's action had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress."[18]

On many occasions, from 1789 to 1950, presidents used military force abroad without first coming to Congress to seek authority. None of those actions, however, amounted to a major war. Edward S. Corwin, the eminent constitutional scholar, said that the list of those presidential initiatives consisted largely of "fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."[19] Respect for constitutional principles ended in 1950 when President Harry Truman took the country to war against North Korea without ever coming to Congress, either before or after.

3. Subversions of the Constitution

On June 26, 1950, President Harry Truman announced that the United Nations Security Council had ordered North Korea to withdraw its forces from South

16. Fisher, *Presidential War Power*, 39–42.

17. *The Prize Cases*, 67 US 635, 668 (1863).

18. Ibid., 660 (emphasis in original).

19. Edward S. Corwin, "The President's Power," *New Republic*, January 29, 1951, 16.

Korea and to return to a position North of the 38th parallel. After North Korea failed to comply, he ordered US air and sea forces to provide support to South Korea. He explained that the United States "will continue to uphold the rule of law."[20] In fact, Truman violated the US Constitution, a congressional statute, the UN Charter, and his own public promises.

In 1945, during debate on the UN Charter, senators considered language that called for member states to enter into "special agreements" when sending armed forces and equipment to the UN for collective military action. To encourage the Senate to pass the charter, Truman wired this note from Potsdam: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."[21] With these words Truman pledged to come to Congress in advance, seeking statutory authority rather than attempting to act unilaterally. This part of the charter had been highly controversial. It was well known to the drafters of the UN Charter that the United States, after World War I, failed to join the League of Nations because President Woodrow Wilson refused to accept a Senate amendment that insisted on the constitutional authority of Congress to initiate war.[22]

Assured by Truman that he understood and respected the war prerogatives of Congress, the Senate ratified the UN Charter. Article 41 provided that all members shall make available to the Security Council, in accordance with special agreements, armed forces and other assistance. Each nation would ratify those agreements "in accordance with their respective constitutional processes." It then became the obligation of Congress to pass legislation to define the constitutional processes of the United States. Section 6 of the UN Participation Act of 1945 states with singular clarity that the special agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."[23] The procedure was specific and clear. The president would first have to obtain the approval of Congress.

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20. *Public Papers of the Presidents*, 1950, 492.

21. 91 *Congressional Record* 8185 (1945).

22. Fisher, *Presidential War Power*, 81–84.

23. 59 Stat. 621, § 6 (1945).

Nevertheless, five years later Truman ordered US troops to Korea without coming to Congress for authority, either in advance of the crisis or afterward. How could Truman violate his own pledge from Potsdam and the explicit language of the UN Participation Act? The short, highly legalistic answer: There was no "special agreement." Even with this evasive maneuver, Truman claimed to be operating under UN authority. His Secretary of State, Dean Acheson, stated that Truman had done his "utmost to uphold the sanctity of the Charter of the United States and the rule of law," and that the administration was in "conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government."[24] The historical record is to the contrary. Truman committed US forces before the council called for military action. In his memoirs, Acheson admitted that "American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."[25] Acheson never explained how Truman could do his "utmost" without coming to Congress in advance for authority.

Korea was the first unconstitutional presidential war because it entirely skirted Congress. What the Truman administration essentially argued is that the president and the Senate, through the treaty process (the UN Charter), could create an alternative means of going to war. Instead of coming to Congress to receive authority in advance from both houses, the president could entirely circumvent Congress and go to an international body for "authority." To accept that reasoning, one would have to argue that the president and the Senate could eliminate the war prerogatives of the House of Representatives, the house closest to the people.

As John Jay warned, presidential wars have often been advanced for partisan and personal reasons, not for the interests of the people. When President Lyndon B. Johnson decided to escalate the war in Vietnam, he knew that Southeast Asia was the last place to be and that an American victory was unlikely. Yet he worried that Republicans would exploit any sign of weakness on his part. With great misgivings, he deepened US involvement to avoid

24. *Department of State Bulletin*, vol. 23, 46 (1950).

25. Dean Acheson, *Present at the Creation* (New York: W.W. Norton, 1969), 408.

appearing "soft on Communism."[26] Instead of formulating an effective plan for the national interest, he pursued "his own political fortunes" and chose to lie "in the pursuit of self-interest."[27] What Johnson promoted as being in the national interest led to presidential deception, misrepresentation, distortion, gross understatements, and outright lies.[28]

The most blatant misrepresentation was the "second attack" in the Gulf of Tonkin on August 4, 1964 that never occurred. President Johnson called the two attacks "unprovoked."[29] In fact, the United States had helped provide support for South Vietnamese attacks on North Vietnam.[30] A study by the National Security Agency on this episode remains classified as of 2005. Apparently, the NSA made mistakes in interpreting North Vietnamese intercepts and decided to conceal the errors rather than admit them. The agency was ready to release the study in 2002, to set matters straight, but it was decided to block publication because the study might trigger unflattering comparisons with the flawed intelligence used to justify the war against Iraq.[31] A cover-up of a cover-up.

The second unconstitutional presidential war was Kosovo, in 1999, when President Bill Clinton went to war not on the basis of a Security Council resolution (which he could not get) but with the backing of NATO countries. This is possibly even more far-fetched than the Security Council argument. President Clinton said he did not need the support of Congress but he did need the support of Italy, Belgium, and other NATO members. The argument is preposterous. This theory would allow the president to run around Congress and obtain "authority" from either an international organization (the UN) or a regional body (NATO). The third unconstitutional presidential war is the current war against Iraq. It may seem constitutional in the sense that President Bush

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26. Michael R. Beschloss, ed., *Taking Charge: The Johnson White House Tapes, 1963–64* (New York: Touchstone, 1998), 88, 95, 213–14, 370, 380.

27. H.R. McMaster, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff and the Lies That Led to Vietnam* (New York: HarperPerennial, 1998), 333–34.

28. Ibid., 330.

29. *Public Papers of the Presidents, 1963–64*, 928.

30. Fisher, *Presidential War Power*, 129–33.

31. Scott Shane, "Doubts Cast on Vietnam Incident, But Secret Study Stays Classified," *New York Times*, October 31, 2005, A1.

received statutory authority from Congress in October 2002. However, Congress did not satisfy its constitutional obligation to *decide* on war. By passing legislation that allowed the president to make that decision, Congress transferred a primary constitutional duty from the legislative branch to the executive branch. That is precisely what the framers fought against.

4. Why These Constitutional Violations?

There are many reasons why the original constitutional design of keeping the war power with Congress has been violated. The main reason is presidential adventurism and disrespect for constitutional boundaries. However, presidents could not have succeeded without the help of a supine Congress,[32] an inactive judiciary beginning with the Vietnam War,[33] academic support, and misconceptions promoted by the media. Added to this mix are the contributions of the neoconservatives, the Federalist Society, and the writings of John Yoo. This section zeroes in on those influences.

A. Academics

Prominent academics offered strong public support for Truman's intervention in Korea. In an article for the *New York Times* on January 14, 1951, the historian Henry Steele Commager insisted that Truman's critics could find "no support in law or in history."[34] Commager argued that when Congress passed the UN Participation Act "it made the obligations of the Charter of the United Nations law, binding on the President."[35] Commager failed to analyze the statutory text and the legislative history of the UN Participation Act (requiring prior approval

32. Louis Fisher, *Congressional Abdication on War and Spending* (College Station: Texas A&M University Press, 2002).

33. Louis Fisher, "Judicial Review of the War Power," *Presidential Studies Quarterly* 35 (2005) 466.

34. Henry Steele Commager, "Presidential Power: The Issue Analyzed," *New York Times Magazine*, January 14, 1951, 11.

35. Ibid., 24.

by Congress) and ignored the fundamental constitutional violation that would occur if the president and the Senate, through the treaty process, stripped the House of Representatives of its prerogatives over war.

In the 1960s, with the nation mired in a bitter war in Vietnam, Commager apologized for his unreserved endorsement of presidential war power. He told the Senate Foreign Relations Committee in 1967 that there should be a reconsideration of executive-legislative relations in the conduct of foreign relations.[36] Returning to the committee in 1971, he testified that "it is very dangerous to allow the President to, in effect, commit us to a war from which we cannot withdraw, because the warmaking power is lodged and was intended to be lodged in the Congress."[37] How could a leading historian of constitutional law miss that elementary point in 1950?

Arthur M. Schlesinger, Jr. threw his weight behind the Korean War. In a letter to the *New York Times* on January 9, 1951, he attacked Senator Robert Taft for saying that Truman "had no authority whatever to commit American troops to Korea without consulting Congress and without Congressional approval." He also rejected Taft's position that Truman, by sending troops to Korea, "simply usurped authority, in violation of the laws and the Constitution." Schlesinger sharply dismissed Taft's statements as "demonstrably irresponsible" and claimed that American presidents had "repeatedly committed American armed forces abroad without prior Congressional consultation or approval."[38]

Demonstrably irresponsible statements had been made, but they were by Schlesinger, not Taft. As valid precedent for Truman's actions in the Korean War, Schlesinger pointed to Jefferson's use of ships to repel the Barbary pirates. In fact, Jefferson took limited defensive actions in the Mediterranean and came to Congress to seek authority for anything that went "beyond the line of defense." Congress enacted ten statutes to authorize military action by Presidents Jefferson and Madison in the Barbary wars. There is no connection

36. "Changing American Attitudes Towards Foreign Policy," hearings before the Senate Committee on Foreign Relations, 90th Cong., 1st Sess. (1967), 21.

37. "War Powers Legislation," hearings before the Senate Committee on Foreign Relations, 92d Cong., 1st Sess. (1971), 62.

38. Arthur Schlesinger, Jr., "Presidential Powers: Taft Statement on Troops Opposed, Actions of Past Presidents cited," *New York Times*, January 9, 1951, 38.

between the actions of Jefferson and Truman. Truman seized the full warmaking authority—defensive and offensive—and never came to Congress for authority. Jefferson respected congressional prerogatives and constitutional limits. Truman did neither. None of the examples cited by Schlesinger were of a magnitude to justify or legalize what Truman did in Korea.

At the height of the Vietnam War, Schlesinger expressed regret for calling Taft's statement "demonstrably irresponsible." He explained that he had responded with "a flourish of historical documentation and, alas, hyperbole."[39] The problem went far beyond flourishes and hyperbole. What Taft said was true. What Schlesinger said was not. As a professional historian, he should have known better. The explanation for Schlesinger's performance is that he decided to abandon his academic role, requiring independence and integrity, and pursue a partisan one. In 1973, Schlesinger described the domestic and international pressures that helped concentrate the war power in the president: "It must be said that historians and political scientists, this writer among them, contributed to the presidential mystique."[40] The issue was not something vague like mystique. It was the pattern of presidents violating constitutional and statutory limits with the encouragement and support of academics.

A major figure in presidential studies was Richard Neustadt. His *Presidential Power* (1960) dominated the field and taught students and professors how presidents gain and exercise political power. His book is often remembered for the theme that presidential power "is the power to persuade."[41] Also well known is his observation that the constitutional convention did not create a government of separated powers: "Rather, it created a government of separated institutions *sharing* powers."[42] These passages suggest mutual accommodation, shared power, and a system of checks and balances.

Later in the book, however, Neustadt clearly advised presidents to take power, not give it. Power was something to be acquired and concentrated in the presidency. The power was for personal—not constitutional—use. Presidents

39. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Co., 1973), 139.

40. Ibid., ix.

41. Richard E. Neustadt, *Presidential Power,* paperback ed. (New York: Signet Book, 1964), 23.

42. Ibid., 42 (emphasis in original).

had every right to seek power for their own use and enjoyment. Neustadt covered much of Truman's initiative in the Korean War, including his decision to fire General Douglas MacArthur and the Supreme Court's decision to strike down Truman's seizure of steel mills to prosecute the war. Yet whether Truman had constitutional or legal authority to go to war did not interest Neustadt at all, nor did he examine Truman's inflated definitions of executive emergency power that the judiciary and the country found so offensive.[43] Certainly, Truman never used the power of "persuasion" to convince Congress and the public for the war. In launching military force, there was no talk of "shared power."

Instead, Neustadt gave presidents every incentive to push power to the maximum, regardless of ostensible constitutional and statutory limits. It was Truman's job "to make decisions and to take initiatives." Among Truman's private values, "decisiveness was high upon his list." His image of the president was "man-in-charge."[44] Operating under this theory, Truman had no obligation to persuade others or enter into give-and-take. The overriding value was making a decision and taking the initiative. Action by itself was a virtue. Identifying constitutional or legal authority was not. Neustadt's book is written for "a man who seeks to maximize his power."[45] It would fit the needs of an American president, Winston Churchill, Adolf Hitler, Benito Mussolini, or Joseph Stalin. Success is measured by action, vigor, decisiveness, initiative, energy, and personal power. Entirely absent are constitutional checks and sources of authority.[46]

B. The Media

Newspaper reporters, television correspondents, and other media outlets have contributed to the belief that presidents may initiate wars. Newspaper and TV

43. Neal Devins and Louis Fisher, "The Steel Seizure Case: One of a Kind?" *Constitutional Commentary* 19 (2000): 67-71.

44. Neustadt, *Presidential Power*, 166.

45. Ibid., 171.

46. For further details on academic contributions to a strong presidency, particularly in time of war, see Louis Fisher, "Scholarly Support for Presidential Wars," *Presidential Studies Quarterly* 35 (2005): 590.

accounts focus on battles, victories, and setbacks. Almost no consideration is given the president's source of authority and how the expansion of executive power threatens representative government, civil liberties, and the constitutional system of checks and balances. There are important exceptions to this record, including the incisive articles and books by Seymour Hersh.[47]

The media furthers the agenda of the executive branch by taking administration statements at face value and distributing them to the public. During the Reagan years, the State Department released a report called "Communist Interference in El Salvador." Nineteen documents (in Spanish) were attached, but most reporters chose to rely on an eight-page summary that the department conveniently provided. The result was a "fantastic public relations coup for the State Department as reporters in effect reduced themselves to human transmission belts, disseminating propaganda that would later be revealed to be false."[48] Reporters would not be as compliant and gullible in printing summaries prepared by congressional committees or a lawmaker's personal office.

In several articles in 1995, Katharine Q. Seelye of the *New York Times* stated that President Clinton "does not need the approval of Congress to send troops to the Balkans."[49] I wrote to her: "Instead of saying, flatly, that Clinton doesn't need the support of Congress, I wish you would say that according to him, and according to some people like [Senator Bob] Dole, he doesn't need it. There are a number of people, including myself, who believe that he cannot act constitutionally unless he has not only the support but the authority of Congress. The legal and constitutional picture is more complex than you paint it."[50]

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47. For example, Seymour Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib* (New York: HarperCollins, 2004).

48. Mark Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency* (New York: Farrar Straus Giroux, 1988), 110.

49. Katharine Q. Seelye, "Legislators Get Plea by Clinton on Bosnia Force," *New York Times*, November 29, 1995, A1. A week later Seelye stated that "President Clinton does not need the support of Congress for the mission" ("Congress and the White House Barter Over Support for US Mission," *New York Times*, December 5, 1995, A7). The following day she wrote: "President Clinton does not need a resolution from Congress to deploy the troops" ("G.O. Opposition Forces Dole to Delay Vote on Bosnia," *New York Times*, December 6, 1995, A14).

50. Louis Fisher, letter to Katharine Q. Seelye at the *New York Times*, December 7, 1995.

My letter seemed to hit home. Five days later Seelye wrote in a newspaper column: "The president says he does not need Congressional authorization for the mission."[51] However, the *New York Times* had already served to "educate" other periodicals. One newspaper, *The Hill*, initially wrote: "Clinton says he'd welcome congressional support, but doesn't think he need it. . . But the Constitution is clear. Only Congress has the ability to declare war."[52] A month later this newspaper reversed course, now stating: "Although President Clinton has the constitutional authority to send US troops to lead a NATO peacekeeping force, and could do so even if Congress votes otherwise, he could be taking an enormous political risk. . . ."[53]

I called the editor and asked why the newspaper had changed its legal position and on what basis did it promote this constitutional power for the president. The answer: his staff accepted the president's independent and unilateral power because of what the *New York Times* had said! Without any basis other than careless wording in a leading newspaper—wording that would later be corrected—*The Hill* wrote an editorial that helped misinform a large audience of lawmakers and congressional staff. Similarly, an editorial by the *Washington Post* blithely remarked: "It is true that President Clinton is asking Congress to approve a Bosnia deployment that he has the formal power to order without asking."[54]

Reporters praised the position of Senate Majority Leader Bob Dole for supporting Clinton's decision to send troops to Bosnia. Even though Dole thought the deployment was a mistake, he backed Clinton: "We have one president at a time. He is the commander in chief. He's made this decision. I don't agree with it. I think it's a mistake. We had a better option, many better options."[55] A columnist for the *Washington Post* wrote that Dole's "old values"

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51. Katharine Q. Seelye, "Clinton Gives Republicans Pledge on Arming Bosnians," *New York Times*, December 13, 1995, A16. The following day she wrote: "Mr. Clinton said he did not need Congressional approval to send 20,000 troops as part of a 60,000-member NATO force" ("Senate and House Won't Stop Funds on Bosnia Mission," *New York Times*, December 14, 1995, A1).

52. "Bosnia and Congress," *The Hill*, October 25, 1995, 32.

53. "Say 'no' to the Dayton Deal," *The Hill*, November 29, 1995, 24.

54. *Washington Post*, November 29, 1995, A24.

55. Helen Dewar and Michael Dobbs, "Dole Supports US Troop Plan for Bosnia Peace," *Washington Post*, December 1, 1995, A1.

emerged on Bosnia. His position gave the world "a glimpse of what many colleagues regard as the essential Dole: the wounded, decorated World War II veteran who never forgot how to salute his commander in chief."[56] It was Dole's obligation, as an enlisted man, to salute the president in World War II. It was not his obligation as Senate Majority Leader to salute the president. As a member of Congress, Dole took an oath to support the Constitution, not the president.

Newspapers did a fairly good job in analyzing the claims of the Bush administration in 2002 that Saddam Hussein possessed weapons of mass destruction. Repeatedly the press took a close look at assertions that Iraq was using aluminum tubes to make nuclear weapons, had developed pilotless aircraft to carry chemical or biological agents, and was trying to purchase uranium ore from a country in Africa. Detailed newspaper stories regularly punctured supposed ties between Iraq and Al Qaeda. The press found executive statements about weapons of mass destruction to be either baseless or strained.[57]

A year after President George W. Bush went to war against Iraq, and after inspections throughout the country had failed to uncover any weapons of mass destruction, several newspapers and magazines began to issue apologies for the unsatisfactory manner in which they had discharged their First Amendment duties. On May 26, 2004, the *New York Times* prepared a statement that took pride in much of its coverage, but noted a number of instances were reporting "was not as rigorous as it should have been." The *Times* found special fault with its dependence on information "from a circle of Iraqi informants, defectors and exiles bent on 'regime change.'" Subsequent reports found much of the information from the exiles to be unreliable and false. Now comes this intriguing passage: "Complicating matters for journalists, the accounts of these exiles were often eagerly confirmed by United States officials convinced of the need to intervene in Iraq. Administration officials now acknowledge that they

56. Helen Dewar, "Dole's 'Old Values' Emerge on Bosnia," *Washington Post*, December 12, 1995, A1.

57. See Louis Fisher, "Justifying War Against Iraq," in *Rivals for Power: Presidential-Congressional Relations*, 3d ed., ed. James A. Thurber, 289–313 (Lanham, MD: Rowman & Littlefield, 2005); James Pfiffner, "Did President Bush Mislead the Country in His Arguments for War with Iraq?" *Presidential Studies Quarterly* 34 (2004): 25; Louis Fisher, "Deciding on War Against Iraq: Institutional Failures," *Political Science Quarterly* 118 (2003): 389.

sometimes fell for misinformation from these exile sources. So did many news organizations—in particular, this one."[58]

This explanation falls flat. It is a mea culpa without the mea. There was no "complication" for journalists. The first mistake was the media's reliance on exiles who had a political agenda (to get rid of Saddam Hussein) and who had been out of the country so long that their information was dated or erroneous. The press should have been on guard and skeptical about their claims. The fact that executive officials "eagerly confirmed" the accounts of exiles hardly justified publication. The executive officials had the same political agenda: to oust Saddam Hussein by charging that he possessed WMDs. It should have been one red flag followed by another. The *Times* offered another explanation:

> Editors at several levels who should have been challenging reporters and pressing for more skepticism were perhaps too intent on rushing scoops into the paper. Accounts of Iraqi defectors were not always weighed against their strong desire to have Saddam Hussein ousted. Articles based on dire claims about Iraq tended to get prominent display, while follow-up articles that called the original ones into questions were sometime buried. In some cases, there was no follow-up at all.[59]

This explanation, however, is unconvincing. No doubt there is a desire to rush scoops into the paper. But why wouldn't a "scoop" undermining the case for the WMDs be just as valuable as a scoop by an Iraqi exile claiming the existence of WMDs? Why did articles based on dire claims about WMDs get more prominent display? Why were articles challenging that assessment sometimes buried or never pursued? Why did there seem a bias in favor of military operations?

On June 28, 2004, the *New Republic* offered its regrets for supporting the war in Iraq and accepting the administration's claims that Saddam Hussein was hiding WMDs. By early 2003, before the United States began military

58. "The Times and Iraq," *New York Times*, May 26, 2004, A10.

59. Ibid.

operations, the magazine said "it was becoming clear that at least two pieces of evidence the administration cited as proof of Saddam Hussein's nuclear program—his supposed purchase of uranium from Niger and his acquisition of aluminum tubes for a supposed nuclear centrifuge—were highly dubious. . . . In retrospect, we should have paid more attention to these warning signs."[60] Given the uncertainty of the evidence, why did the magazine lean toward war?

Additional soul-searching came from the *Washington Post*. The executive editor and other top editors said that the newspaper had made a mistake before the war began by not giving front-page prominence to articles that cast doubt on the administration's argument about WMDs in Iraq. Candor is commendable, but why the pronounced bias? Why promote one side and largely ignore the other? Articles that questioned the administration's rationale appeared far back in the paper, on pages A18 or A24. In contrast, from August 2002 to the start of military operations on March 19, 2003, the *Post* ran more than 140 front-page stories that highlighted administration rhetoric that justified war. Some of the sensational headlines included: "Cheney Says Iraqi Strike Is Justified"; "War Cabinet Argues for Iraq Attack"; "Bush Tells United Nations It Must Stand Up to Hussein or US Will"; "Bush Cites Urgent Iraqi Threat"; "Bush Tells Troops: Prepare for War." Why this drumbeat for war from a supposedly independent press? Why did those stories, which could have been written by the White House, displace stories that questioned and analyzed the administration's facts and statements?[61]

C. Leo Strauss and the Neoconservatives

As a driving force behind the war in Iraq, it would be difficult to overestimate the influence of neoconservatives. The push for an aggressive foreign policy came from the neocons, who had taken a hard military line against Communism

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60. "Were We Wrong?," *The New Republic*, June 28, 2004, 8; see Howard Kurtz, "New Republic Editors 'Regret' Their Support of Iraq War," *Washington Post*, June 19, 2004, C1.

61. Howard Kurtz, "The Post on WMDs: An Inside Story," *Washington Post*, August 12, 2004, A1, A20; "Washington Post Rethinks Its Coverage of War Debate," *New York Times*, August 13, 2004, A14.

and continued to press that agenda after the collapse of the Soviet Union. Neocons, strategically located in the White House and executive departments, began drafting ambitious plans for military action against Iraq and converting its government to a liberal democracy. This community of academic activists owes a special debt to the political philosopher Leo Strauss.

Leo Strauss left Germany in 1932 to conduct research in France and England. He moved to the United States in 1938 and taught for several decades at the New School for Social Research and the University of Chicago. Strauss concentrated on political philosophy, not foreign policy or national security, and yet his writings reveal a passionate stand against totalitarianism, opposition to relativism, and critiques of value-free scholarship.[62] He faulted liberalism for producing relativism, an erosion of religious faith, and nihilism, and he associated liberal democracy with the weak and ineffective Weimar Republic that fell to Nazism.[63] Strauss opposed much of modernism and sought guidance from earlier times. In similar fashion, Muslim fundamentalists resist the influence of the West and look to more traditional values. Generalizations about Straussians are hazardous. They split into different camps and frequently war with each other.[64] Prominent neocons in the defense establishment include such names as Paul Wolfowitz, Douglas Feith, Abram Shulsky, I. Lewis (Scooter) Libby, William Kristol, Carnes Lord, Gary Schmitt, Richard Perle, Elliott Abrams, John Bolton, and Zalmay Khalilzad.[65]

Straussians and neocons object to modernism's "turning away from the traditional understanding of truth as an independently existing, accessible and knowable quality."[66] From this vantage point, they stake out a strong moral

62. Leo Strauss, "An Epilogue," in *Essays on the Scientific Study of Politics*, ed. Herbert J. Storing, 307 (New York: Holt, Rinehart and Winston, 1962).

63. Shadia B. Drury, *Leo Strauss and the American Right* (New York: St. Martin's Press, 1999), 2–17.

64. Ibid., 97–136. For a collection of essays by Straussians, see Kenneth L. Deutsch and John A. Murley, eds., *Leo Strauss, the Straussians, and the American Regime* (Lanham, MD: Rowman & Littlefield, 1999).

65. Anne Norton, *Leo Strauss and the Politics of American Empire* (New Haven: Yale University Press, 2004), 6–18; John Micklethwait and Adrian Wooldridge, *The Right Nation: Conservative Power in America* (New York: Penguin Press, 2004), 200–07; James Mann, *Rise of the Vulcans: The History of Bush's War Cabinet* (New York: Viking, 2004), 22–29; Elizabeth Drew, "The Neocons in Power," *New York Review of Books*, June 12, 2003, 20–22.

66. Bernard Susser, "Leo Strauss: The Ancient as Modern," *Political Studies* 36 (1988): 499.

position on good and evil, whether evil takes the form of a political philosopher, Communism, or Saddam Hussein. Strauss, for example, called Machiavelli the "teacher of evil."[67] Strauss' writing style has been described as combative, rancorous, truculent, belligerent, and aggressive.[68] His critiques of those he disagreed with were "sharp, cutting, and often rebuking."[69] In their ideological battles with domestic and international adversaries, neocons "have not infrequently viewed their enemies as embodiments of evil who must be destroyed, rather than as opponents to be debated or persuaded."[70] In these public debates, neocons "seemed less interested in promoting dialogue with opponents than with demolishing them."[71]

The word "evil" is not used casually. It evokes strong emotions in Straussians and neocons. It was not happenstance that President Ronald Reagan called the Soviet Union "the evil empire," and it was a short step from there to President George W. Bush referring to Iraq, Iran, and North Korea as the "axis of evil." Allan Bloom, a Straussian and author of the best-selling *The Closing of the American Mind* (1987), inveighed against moral relativism and the consequent loss of the search for truth. Students, he mourned, had "no idea of evil."[72] Consistent with this theme is a recent book by David Frum and Richard Perle: *An End to Evil: How to Win the War on Terror* (2004).

Neocons are comforted by the thought that evil is on one side and they are on the other. Fighting evil, as they see it, would justify whatever steps are needed to advance the Truth. If facts must be withheld or twisted to promote war and achieve a noble cause, justification comes easy. Sissela Bok, who

67. Leo Strauss, *Thoughts on Machiavelli* (Glencoe, IL: The Free Press, 1958), 9. Elsewhere in this book he calls Machiavelli "an evil man," "immoral and irreligious," "diabolical," and "a devil." Ibid., 9, 12, 13.

68. Susser, "Leo Strauss," 498, 512, 514.

69. Hwa Yol Jung, "Leo Strauss's Conception of Political Philosophy: A Critique," *Review of Politics* 29 (1967): 492.

70. John Erman, *The Rise of Neoconservatism: Intellectuals and Foreign Affairs, 1945–1994* (New Haven: Yale University Press, 1995), 190.

71. Gary Dorrien, *The Neoconservative Mind: Politics, Culture, and the War of Ideology* (Philadelphia. Temple University Press, 1993), ix.

72. Allan Bloom, *The Closing of the American Mind* (New York: Simon and Schuster, 1987), 67. See also 25ff, 34, and 141ff.

teaches ethics at Harvard Medical School, explained that individuals who are convinced they know the truth can easily justify lies: "They may perpetuate so-called pious frauds to convert the unbelieving or strengthen the conviction of the faithful. They see nothing wrong in telling untruths for what they regard as a much 'higher' truth."[73] Of course, this frame of mind, resolute spirit, crusading militarism, and moral certitude are held with equal intensity by neocons and Islamic fundamentalists. Both sides see themselves as fighting evil.[74]

Strauss had a pattern of fabricating monsters and bugbears. He claimed that Nietzsche "preached the sacred right of 'merciless extinction' of large masses of men . . . ."[75] Strauss provided no evidence or citation to support his attack. Scholars of Nietzsche find nothing in his writings to justify Strauss' intemperate and irresponsible broadside.[76] The neocons who shaped the military operations against Iraq did not dedicate their professional careers to political philosophy, as Strauss did. What they inherited from him—and applied to Iraq—was a manner of argument: dividing the world between good and evil; a penchant for identifying enemies, real or imagined; a certitude and dogmatic spirit that accompanies the belief that one is in the right and knows the truth; a writing style honed to attack and to demonize, with or without supporting evidence; a determination to confront and root out regimes designated as evil; and a consequent willingness to employ military force, deception, and manipulation to advance a predetermined political cause. Those Straussian values supplied important energy, focus, and discipline to removing Saddam Hussein from power.

In the 1980s, neocons were successful in having President Ronald Reagan promote Wilsonian principles as part of an effort to spread democracy around the globe. The strategy of neocons at that time depended on political pressure and financial assistance, not military force.[77] Joshua Muravchik's book, *Exporting Democracy* (1992), is written within a framework of democratic

73. Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Pantheon Books, 1978), 7.

74. See two recent books by Tariq Ali: *The Clash of Fundamentalisms; Crusades, Jihads and Modernity* (London: Verso, 2003) and *Bush in Babylon: The Recolonisation of Iraq* (London: Verso, 2003).

75. Leo Strauss, *What Is Political Philosophy?* (Chicago: University of Chicago Press, 1988 ed.), 55.

76. Laurence Lampert, *Leo Strauss and Nietzsche* (Chicago: University of Chicago Press, 1996), 8.

77. Erman, *The Rise of Neoconservatism*, 161–63.

realism, which includes a willingness to advance US interests by war. However, the techniques he urged were ideological, not military: overseas radio broadcasting, rhetorical encouragement, emergency relief, economic credits, debt relief, investment, internships in the West, student exchanges, and sending US experts abroad to counsel on fledgling civil and governmental bodies and businesses.[78]

Institutionally, neocons line up behind a powerful presidency. They view any attack on the president as damaging "the main institutional capability the United States possesses for conducting an overt fight against the spread of Communist power in the world."[79] Although neocons frequently praise Reagan as a strong leader, they criticized his failure in office to protect his institutional powers, leaving the office "weaker than he found it."[80] Charles Krauthammer's method of constitutional analysis is straightforward. The touchstone is not the text of the Constitution, the framers' intent, or the principles of republican government. Rather, look to see what is needed for imperial government and work backward to find that the necessary actor is an imperial president: "politically, imperial responsibility demands imperial government, which naturally encourages an imperial presidency, the executive being (in principle) a more coherent and decisive instrument than its legislative rival."[81] Of course, the framers knew all about presidents being more "coherent" and "decisive" and rejected that model as offering too great a risk to democratic government.

D. The Federalist Society and John Yoo

The Federalist Society began at Harvard Law School, the University of Chicago Law School, and the Yale Law School in 1982 as a student organization that challenged what it regarded as orthodox liberal teachings in most law schools.

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78. Joshua Muravchik, *Exporting Democracy: Fulfilling America's Destiny* (Washington, DC: AEI Press, 1992 ed.).

79. Norman Podhoretz, "Making the World Safe for Communism," *Commentary,* April 1976, 35.

80. L. Gordon Crovitz, "How Ronald Reagan Weakened the Presidency," *Commentary*, September 1988, 25.

81. Charles Krauthammer, "The Price of Power," *The New Republic*, February 9, 1987, 23.

In its Statement of Principles, the society stated that it was founded on the principles that the state exists to preserve freedom, that the separation of powers is central to the US constitutional form of government, and that the role of the judicial branch is to say what the law is, not what the law should be. The society currently has chapters at 145 US law schools, including all of those ranked in the top 20. Among the prominent names associated with the Federalist Society are Supreme Court Justices Antonin Scalia and Clarence Thomas, former DC Circuit Judge Robert Bork, former US Attorney General Edwin Meese, and Senator Orrin Hatch.[82]

Anyone who participates in a Federalist Society conference will recall the silhouette of James Madison prominently displayed on the wall behind the speakers. One would expect, therefore, the society to be dedicated to the principles of checks and balances and the doctrine of separated powers. Not so. The society expresses little interest in those constitutional principles and especially is that so when it comes to the war power. It is comfortable in vesting that power in the executive branch, allowing the president to engage in wars without legislative or judicial interference.

The problem with this position is that the society also endorses with great fervor the belief in Original Intent. Federalist members believe that sound constitutional analysis requires an adherence to the intent of the Constitution as expressed through the Founding Fathers. How can the original intent of the framers ever be squared with the concentration of the war power in the president?

That is where John Yoo enters. Currently a professor of law at the University of California at Berkeley (Boalt Hall), Yoo graduated from Yale Law School in 1992 and has had a meteoric career since then. He served as general counsel of the Senate Judiciary Committee, as a law clerk to Justice Clarence Thomas and Judge Laurence H. Silberman, and as a deputy assistant attorney general in the Office of Legal Counsel (OLC) of the US Department of Justice from 2001 to 2003. During his time with OLC, he was closely involved in what became known as the "torture memos" drafted and circulated within the Bush administration.

82. http://en.wikipedia.org/wiki/Federalist_Society

The dilemma facing the Federalist Society—mixing Original Intent with presidential wars—was tackled head-on by John Yoo in an article for the *California Law Review* in March 1996. The "article" is in fact a monograph. It runs 139 pages and is adorned with 625 footnotes. His dramatic, bold theme is captured in the summary that appears just before the introductory section. In response to recent legal criticism of executive initiatives in the war-making process, Yoo examined the historical and legal background of war powers in the Anglo-American world of the 17th and 18th centuries and concluded that "the Framers created a framework designed to encourage presidential initiative in war." Congress was given a role in war-making decisions "not by the Declare war Clause, but by its power over funding and impeachment." Federal courts "were to have no role at all."[83]

Law reviews are student-run publications. The submitted manuscripts are not peer-reviewed by scholars and experts. Instead, 23- or 24-year-old articles editors look through hundreds of submitted articles and choose what to print. How do they react to a manuscript that is destined to run 139 pages, fastened down with 625 footnotes, and offers a legal theory not seen elsewhere? They are very likely to publish it, regardless of its merits or how tenable the argument. Articles editors, talented and bright as they are, cannot provide a professional, expert read of a manuscript. They are no more learned in British history and the war power than a student at a medical school. In fact, students at a medical school do not pretend to have the competence to select and publish articles for a professional journal. Nor do students at any other graduate school. The "law review' is a unique American practice.

On the hunt for originality, articles editors are eager to publish a manuscript that is likely to stimulate discussion, be cited by other law reviews, and perhaps be mentioned in decisions issued by federal or state courts. It is not at all unusual for a law review article, harebrained though it may be, to prompt dozens of counter-replies that go on for years until it is finally recognized by an exhausted readership that the ground is hopelessly

83. John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers," 84 *California Law Review* 167, 170 (1996).

arid. How this outpouring of articles contributes to scholarship, understanding, and progress is never explained.

One would have thought that even a 23- or 24-year-old articles editor would have asked Yoo: "If the framers created a framework designed to encourage presidents to initiate war, confined Congress to decisions of funding and impeachment, and prohibited a role for the US courts, why is the Constitution written as it is? Surely, articles editors must have some interest in the text of the Constitution. It may be too much to expect an articles editor to be aware of the extent to which the framers broke with Blackstone and the British model, and perhaps too much to expect even an awareness of what the framers said at the Philadelphia Convention and the ratifying conventions, but text supposedly matters and it represents unquestionable evidence of what the framers intended in allocating political power.

Moreover, it should have been within the competence of an articles editor to check what federal courts decided in war power disputes for the first two decades. Easily within reach would have been the decisions of the Supreme Court in *Bas* v. *Tingy* (1800), *Talbot* v. *Seeman* (1801), and *Little* v. *Barreme* (1804), where the Court looked exclusively to Congress for the meaning of the war power. In the latter case, the Court decided that when a collision occurs in time of war between a presidential proclamation and a congressional statute, the statute trumps the proclamation.[84] An easy computer search of those two decades would have uncovered the *Smith* case in 1806, where a federal circuit court forcefully rejected the argument that the president could ignore and countermand the Neutrality Act of 1794. "The President, said the court, "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."[85] The circuit court clearly understood the difference between the defensive powers of the president and the offensive powers of Congress. There was "a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province

84. *Bas v. Tingy*, 4 Dall. (4 US) 37 (1800); *Talbot v. Seeman*, 5 US (1 Cr.) 1, 28 (1801); *Little v. Barreme*, 2 Cr. (6 US) 170, 179 (1804).

85. *United States v. Smith*, 27 Fed. Cas. 1192, 1229 (C.C.N.Y. 1806) (No. 16,342).

of congress to change a state of peace into a state of war."[86] Does the president, the court asked, "possess the power of making war? That power is exclusively vested in Congress."[87] The judiciary understood those basic principles.

In 1807, Chief Justice John Marshall wrote for the Court in a case involving a motion for habeas corpus to bring up Samuel Swartwout and Erick Bollman, both charged with treason for levying war against the United States. Marshall, after first noting that the power of a US court to award the writ "must be given by written law" (i.e., by Congress),[88] found that the authority existed in Section 14 of the Judiciary Act of 1789. He underscored the plenary prerogative of Congress over the decision to suspend the writ: "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."[89]

On this matter of the war power, the Court again looked solely to Congress for guidance. Following this decision, the two prisoners were brought before the Court where it was decided that there was not sufficient evidence to justify the commitment of either one on the charge of treason in levying war against the United States. In this manner, the Court announced two principles. It looked to Congress for the authority to suspend the writ in time of emergency, and it used its judicial power to require the executive branch to release the prisoners and have them brought before the Court for independent judicial scrutiny. The president and the executive branch possessed no sole or exclusive powers over war or national emergencies.

Armed with this elementary information, an articles editor could have put this question to Yoo: "If the courts were to have 'no role at all' in war power matters, how do you explain the decisions by the Supreme Court in 1800, 1801, 1804, and 1807, and the decision by the federal circuit court in 1806?" Any

86. Ibid., 1230.

87. Ibid.

88. *Ex parte Bollman*, 4 Cr. (8 US) 75, 94 (1807).

89. Ibid., 101.

professional reviewer would have been aware of those decisions. Obviously, the articles editors at the prestigious *California Law Review* were not. Of those five seminal decisions, Yoo in his 625 footnotes mentions only three. He cites *Bas* v. *Tingy* (1800) for the distinction between a "perfect war" (a declared war) and an "imperfect war" (an undeclared war).[90] He cites *Little* v. *Barreme* (1804) but omits any mention of how the Supreme Court decided that a federal statute in time war was superior to a presidential proclamation.[91] Toward the end of the article he mentions *Bas* v. *Tingy*, *Talbot* v. *Seeman*, and *Little* v. *Barreme*, rejecting the position of commentators who regard those opinions, "particularly *Little*, as contemporaneous evidence showing that courts can exercise jurisdiction over war power cases."[92] Articles editors could have read those decisions (each of them quite short) to determine if the commentators had a point. Apparently they did not educate themselves on what the Court decided, preferring to remain at arms length from evidence and limit their review to assuring that the citation was correctly entered.

How does Yoo reconcile those decisions with his position that federal courts have "no role at all" in war power disputes? He explained that none of the three cases "called upon the Supreme Court to decide that the President was waging war in violation of the Constitution, or that Congress has failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war."[93] He tries to escape by changing the subject. The three cases clearly show that federal courts *do* have a role in war power disputes. Second, the five cases I singled out demonstrate that the courts understood that under the Constitution the President *could not* initiate war against another country. That decision was reserved to Congress. The Supreme Court did not have to decide that the president was waging war in violation of the Constitution because no president attempted to do that. They knew better. So did the courts and so did Congress. Third, the Court did not have to decide that Congress had failed to declare that a state of war existed. The Court simply ruled that Congress

90. Yoo, "The Continuation of Politics by Other Means," 205, note 202.

91. Ibid., 245, note 379.

92. Ibid., 293, notes 573, 574, and 575.

93. Ibid., 293.

had a choice. It could authorize war or it could declare it. Fourth, in *Little* v. *Barreme* the Court clearly stepped in to adjudicate an inter-branch dispute over war and ruled that a statute is superior to a proclamation. Why couldn't some of those thoughts have occurred to the articles editors?

Yoo discussed *Bas, Talbot,* and *Little* again on a separate page, quoting from each but ignoring Chief Justice Marshall's statement in *Talbot* that the "whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."[94] There were 625 footnotes, but no room for that one. The closest that Yoo can come to acknowledging Marshall's statement is this comment, dropped in a footnote: "To be sure, these decisions contain dicta that could support arguments for exclusive congressional power over war."[95] Dicta are remarks that are extraneous to a holding. Marshall's omitted sentence goes to the heart of constitutional authority over war, which he finds solely in Congress.

In this same footnote, Yoo decides to critique what other scholars have said about *Little* v. *Barreme*. He said that critics of modern presidential war powers "have read *Little* as standing for two propositions: (i) that courts can hear war powers cases, and (ii) that Congress can regulate the conduct of war even if Congress' regulations conflict with presidential orders."[96] Yoo charges that these scholars "surely over-read *Little*." Why is that? He says that the Court "could hear the case because it involved maritime and prize jurisdiction, which the text of the Constitution grants to the federal courts. Thus, the case did not really call upon the court to pass judgment on the exercise of war powers, and thus did not present a political question."

Once again Yoo changes the subject. He also ignores the fact that the Court *did* call upon the Justices to pass judgment on the exercise of war powers, and it surely presented a political question in the sense that the Court upheld a congressional statute over a conflicting presidential proclamation in time of war. Yoo again: "The Court did not enjoin enforcement of the President's order, but instead merely found that Captain Little was personally liable for damages."

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94. 5 US 1, 28 (1801).

95. Yoo, "The Continuation of Politics by Other Means," 294, note 584.

96. Ibid., 295, note 584.

That is disingenuous. The Court did not enjoin enforcement of the president's proclamation because the Quasi-War (from 1798 to 1800) was over. There was nothing to enjoin. Furthermore, in "merely" finding that Captain Little was personally liable for damages, the Court reached that decision because Little mistakenly followed a presidential proclamation instead of a congressional statute.

A final quote from Yoo appears in this footnote: "*Little* never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond Congress' commands." Both parts of that sentence are false. Obviously, *Little* reached questions concerning the justiciability of inter-branch war powers disputes. The Court upheld a congressional statute over a conflicting presidential proclamation. Moreover, the Court *did* reach the question of the president's inherent authority to order captures going beyond the statutory authority of Congress. In deciding in favor of the statute, the Court dismissed any possible claim of the president's inherent authority in the dispute being adjudicated. As to some other invocation of inherent presidential authority in some other dispute, there was no reason for the Court—or any court—to decide questions not placed before it. Yoo knows that as well as anyone. The articles editors should have known it as well.

As to the role of courts in war power disputes, Yoo argued that "[n]o provision [of the Constitution] explicitly authorizes the federal courts to intervene directly in war powers questions."[97] It is remarkable that an articles editor would not have challenged that sentence by pointing out that nothing in the Constitution explicitly authorizes the federal courts to intervene directly in questions of the Commerce Clause, the Taxing Power, and other constitutional disputes regularly adjudicated in federal courts. Nothing in the Constitution explicitly authorizes Congress to investigate, to issue subpoenas, or to hold executive officers in contempt, activities that Congress engages in regularly.[98] Nothing in the Constitution explicitly authorizes the president to remove top executive officials, an implied power that courts have long recognized.[99]

97. Ibid., 176.

98. Louis Fisher, *The Politics of Executive Privilege* (Durham: Carolina Academic Press, 2004), 3–25, 91–134.

99. Louis Fisher, *Constitutional Conflicts between Congress and the President*, 4th ed. (Lawrence: University Press of Kansas, 1997), 49–77.

Does Yoo really attempt to interpret the Constitution solely on the basis of explicit powers and therefore deny the existence of implied powers? It is possible to make that argument, even if it flies in the face of two centuries of constitutional history. It would do away with many activities, including the power of judicial review, which is not explicitly stated in the Constitution. But if Yoo decided to limit himself to explicit powers he could not find in the Constitution an explicit power that allowed the president to initiate wars.

More could be said in analyzing Yoo's article in the *California Law Review* ,and I have done so elsewhere.[100] The central point here is to understand the lengths to which Yoo would go in arguing that the framers created a framework that encouraged presidents to initiate wars, limited the legislative checks available to Congress, and left "no role at all" for federal courts. That model of presidential government would reappear after 9/11 when Yoo helped draft the "torture memos" for OLC, and it is developed further in his new book, *The Powers of War and Peace* (2005).

5. The Torture Memos

Two weeks after the terrorist attacks of 9/11, Yoo in his capacity as Deputy Assistant Attorney General wrote a "Memorandum Opinion for the Deputy Counsel to the President," dated September 25, 2001. He argued that the president "has constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations." Moreover, the president may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific incidents of September 11."[101] Interpreting constitutional power in that manner would justify President Bush

100. Louis Fisher, "Unchecked Presidential Wars," 148 *University of Pennsylvania Law Review* 1637, 1658–68, 1671 (2000).

101. http:www.usdoj.gov/olc/warpowers925.htm

using military force against such countries as Egypt, Iran, Iraq, Saudi Arabia, Syria, and Yemen, to name just a few places that immediately come to mind.

According to Yoo's memo, during the period "leading up to the Constitution's ratification, the power to initiate hostilities and to control the escalation of conflict had long been understood to rest in the hands of the executive branch."[102] What legal and constitutional support does Yoo cite for that position? Why it is his 1996 article for the *California Law Review*! The problem with his analysis is that in the period leading up to the Constitution's ratification, *there was no executive branch in America.* There was only the Continental Congress, which exercised all three powers—legislative, executive, and judicial.[103]

Yoo's memo often goes beyond legal analysis to make broad assertions about military force. He said "[t]here can be no doubt that the use of force protects the Nation's security and helps it achieve its foreign policy goals."[104] That cannot be said about such wars as Vietnam. There is good reason why it cannot be said about the current Iraq War. In looking to the effect of such statutes as the War Powers Resolution and the joint resolution of September 14, 2001, which authorized war against Afghanistan, Yoo stated that neither statute "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. These decisions, under our Constitution, are for the President to make alone."[105] That follows under Yoo's constitution, but not under the US Constitution.

These broad assertions of presidential authority would reappear in other OLC memos that Yoo either authored, coauthored, or contributed to. A memo of December 28, 2001, written by Yoo and Patrick F. Philbin, another OLC deputy, was directed to William J. Haynes, II, General Counsel of the Department of Defense. It concludes that "the great weight of legal authority indicates that a federal district court could not properly exercise habeas

102. Ibid., 2.

103. Louis Fisher, *President and Congress* (New York: The Free Press, 1972), 6–17.

104. Ibid., 5.

105. Ibid., 16.

jurisdiction over an alien detained at GBC [Guantanamo Bay, Cuba]."[106] That line of analysis, rejected by the Supreme Court in *Rasul* v. *Bush*,[107] would have allowed executive officials to conduct interrogations and military tribunals without any interference from federal courts.

Yoo teamed up with another OLC attorney, Robert J. Delahunty, to send a second memo to Haynes on January 9, 2002. This one concerned the application of treaties and laws to Al Qaeda and Taliban detainees. They concluded that such treaties as the Geneva Conventions and various statutes "do not protect members of the Al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that these treaties do not apply to the Taliban militia."[108] Treaty provisions, including prohibitions on physical or mental torture, coercive interrogations, acts of violence, inhumane treatment, and any form of cruelty,[109] would not apply. Nor could Congress, by statute, interfere with the president's authority over detainees: "Any congressional effort to restrict presidential authority by subjecting the conduct of the US Armed Forces to a broad construction of the Geneva Convention, one that is not clearly borne by its text, would represent a possible infringement on presidential discretion to direct the military."[110] Yes, the president has authority to direct the military, but so does Congress, and it has exercised that authority frequently through statutory action.

These legal and constitutional analyses by Yoo led directly to a 50-page memo written by OLC head Jay S. Bybee, prepared for White House Counsel Alberto Gonzales and dated August 1, 2002. Bybee advised Gonzales that for an act to constitute torture "it must inflict pain that is difficult to endure." Physical pain amounting to torture "must be equivalent in intensity to the pain

106. Patrick F. Philbin and John C. Yoo, Office of Legal Counsel, US Department of Justice, "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," to William J. Haynes, II, General Counsel, Department of Defense, December 28, 2001, 1.

107. 542 US 466 (2004).

108. John Yoo and Robert J. Delahunty, Office of Legal Counsel, US Department of Justice, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," to William J. Haynes, II, General Counsel, Department of Defense, 1.

109. Third Geneva Convention, Protection of War Victims, TIAS [US Treaties and Other International Agreements] 3328, 3330, 3384, 3393 (Articles 13, 17, 87, 99).

110. Yoo and Delahunty, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," 11.

accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[111] Bybee incorporated Yoo's definition of presidential power in time of war. Even if an interrogation method were to violate legislation enacted by Congress, "the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the president has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy."[112] Because this power, as read by Bybee and Yoo, comes from the Constitution, no statute or treaty can limit it. The problem for Bybee and Yoo was to demonstrate, in a credible way, how those powers are derived from the Constitution and how such a concentration of power could coexist with the rule of law and democratic government.

These OLC legal interpretations greatly influenced the working group that Defense Secretary Donald Rumsfeld established on January 15, 2003. It was directed "to assess the legal, policy, and operational issues relating to the interrogation of detainees held by the US Armed Forces in the war on terrorism."[113] When the report of the working group was released, first as a draft on March 6, 2003 and later as a final report on April 4, 2003, they showed the marked impact of OLC analysis of presidential power, treaties, and statutes. Both reports state that the torture statute "does not apply to the conduct of US personnel at Guantanamo, and both interpret the torture statute as not applying "to the President's detention and interrogation of enemy combatants pursuant to his Commander-in Chief authority."[114] From these legal memos it was a short step to the torture of detainees at Guantanamo Bay, Afghanistan, and Iraq, including the notorious prison at Abu Ghraib.[115]

111. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A," to Alberto R. Gonzales, Counsel to the President, August 1, 2001, 1.

112. Ibid., 31.

113. Office of the Secretary of Defense, "Detainees Interrogations," Memorandum for the General Counsel of the Department of Defense, January 15, 2003, declassified June 21, 2004.

114. Louis Fisher, *Military Tribunals and Presidential Power* (Lawrence: University Press of Kansas, 2005), 207–08.

115. Ibid., 198–209.

6. The Road to the Iraq War

All of the factors discussed above promoted independent presidential decisions to go to war. The second war against Iraq, however, was fueled by neocon ideology. Many of them thought that President George H.W. Bush made a grievous error in 1991 by not taking the fight directly to Baghdad to unseat Saddam Hussein. For them, that was unfinished business to be tended to by the Bush II administration. Neocons advocated US superiority over the rest of the world. Michael Ledeen wrote in the *Weekly Standard* in 1996: "our foreign policy must be ideological—must be designed to advance freedom. . . . In these days of multicultural relativism, it is unfashionable to state openly what the rest of the world takes for granted: the superiority of American civilization."[116]

This attitude helped spur and justify the second Iraq war and it colors the National Security Strategy issued by the Bush administration in 2002. Along the way, neocons were drafting muscular versions of foreign and military policy. In 1992, toward the end of the Bush I administration, Paul Wolfowitz, Lewis Libby, and Zalmay Khalilzad produced a Pentagon document called the Defense Planning Guidance. A draft copy, leaked to the press, envisioned the United States as the globe's only superpower, capable of using its military might to advance and protect US interests. After running into strong criticism, the draft was rewritten and toned down.[117] The strong military edge, however, would reappear in subsequent documents prepared by neocons.

Just as there are many kinds of Straussian, so is there a range of views among neocons. Yet even conservatives who object to generalizations about neocons (e.g., neocons have "taken over" American foreign policy) acknowledge that the foreign policy of the Bush administration after 9/11 "can accurately be characterized as neoconservative, guided as it is by the idea that America should transform despotic polities into liberal democracies."[118] Neocons put

116. Michael A. Ledeen, "A Republican Contract with the World," *Weekly Standard*, May 13, 1996, 25. See also Julie Kosterlitz, "The Neoconservative Moment," *National Journal*, May 17, 2003, 1542.

117. Mann, *Rise of the Vulcans*, 208–15.

118. Ramesh Ponnuru, "Getting to the Bottom of This 'Neo' Nonsense," *National Review*, June 16, 2003, 29.

their political agenda front and center. Writing in 1996, William Kristol and Robert Kagan advocated a "neo-Reaganite" foreign policy. That meant hefty increases in military spending, "greater moral clarity," and a need to champion "American exceptionalism."[119] Here is a key phrase used to justify America's preeminent military role in the post-Cold War world: "Benevolent global hegemony." For those who considered such language as "either hubristic or morally suspect," Kristol and Kagan explained that a hegemon "is nothing more or less than a leader with preponderant influence and authority over all others in its domain." When Russia and China denounce US "hegemonism," neocons accept this criticism "as a compliment and guide to action."[120] For those who object to the United States glorifying the notion of dominance and the use of military force, Kristol and Lawrence Kaplan reply: "Well, what is wrong with dominance, in the service of sound principles and high ideals?"[121]

Neocons offered many reasons for overthrowing Saddam Hussein. Writing in 1999, David Wurmser devoted much of his analysis to Hussein's "pernicious, extortionist character" and his "brutal use" of force against Iraqi citizens and neighboring countries."[122] Citing Hussein's bloody record is a convenient way to build public support for military action, but Wurmser recognized a US interest in Iraq that had nothing to do with whether an immoral tyrant was in power:

> A nation of 22 million, Iraq occupies some of the most strategically blessed and resource-laden territory of the Middle East. It is a key transportation route, and it is rich in both geographic endowments and human talent. Its location on pathways between Asia and Europe, Africa and Asia, and Europe and Africa makes it an ideal route for armies, pipelines, and trade from both the eastern

119. William Kristol and Robert Kagan, "Toward a Neo-Reaganite Foreign Policy," *Foreign Affairs* 75 (1996): 18, 19.

120. Ibid., 20.

121. Lawrence F. Kaplan and William Kristol, *The War Over Iraq: Saddam's Tyranny and America's Mission* (San Francisco: Encounter Books, 2003), 112.

122. David Wurmser, *Tyranny's Ally: America's Failure to Defeat Saddam Hussein* (Washington, DC: AEI Press, 1999), 116.

> Mediterranean and Asia Minor to the Persian Gulf. Iraq also has large, proven oil reserves, water, and other important resources.[123]

In a book edited in 2000, Kristol and Kagan set forth an ambitious and bellicose agenda, as did the authors who contributed essays (including Elliott Abrams, Richard Perle, and Paul Wolfowitz). Regarding Iraq, Kristol and Kagan objected that Bush I "failed to see that mission through to its proper conclusion: the removal of Saddam from power in Baghdad."[124] US troops should have been kept in Iraq "long enough to ensure that a friendlier regime took root."[125] A section on "regime change" encouraged "a broad strategy of promoting liberal democratic governance throughout the world."[126] Military action against Iraq would the first of several steps.

Much of the neocon framework appears in "The National Security Strategy of the United States of America," released by the Bush administration in September 2002. It bristles with the doctrines of preemption, preventive war, military superiority, and US preeminence in world affairs. The report explains that the United States embodies certain intrinsic truths and that it has a moral and political obligation to spread those truths to other countries, using military force if necessary.

The introduction by President Bush begins by identifying "a single sustainable model for national success: freedom, democracy, and free enterprise." That model, according to Bush, does not merely apply to the United States and its allies. It is a model for the entire world. Thus, the "values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages."[127]

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123. Ibid., 117.

124. Robert Kagan and William Kristol, eds., *Present Dangers: Crisis and Opportunity in American Foreign and Defense Policy* (San Francisco: Encounter Books, 2000), 6.

125. Ibid., 19.

126. Ibid., 17.

127. "The National Security Strategy of the United States of America," introductory remarks by President George W. Bush (September 2002), 1.

In his introductory statement, Bush claimed that the United States will "not use our strength to press for unilateral advantage." That was false. Within a year, US troops would use offensive force against Iraq and threaten military action against Iran and Syria. Bush said that America will create a balance of power and conditions "in which all nations and all societies can choose for themselves the rewards and challenges of political and economic liberty." The word "choice" is misleading, as evident by the war against Iraq. In fighting "terrorists and tyrants," the United States "will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization." That signals a further threat of military force.

Bush ended his statement by calling freedom "the non-negotiable demand of human dignity; the birthright of every person—in every civilization." In what could be read as an American jihad, he insisted that "humanity holds in its hands the opportunity to further freedom's triumph" over war, terror, tyrants, poverty, and disease. "The United States welcomes our responsibility to lead in this great mission."

7. Administration Incompetence

The neocons who precipitated the second Iraq war displayed little apprehension about the use of US military power. America's commitment of armed forces abroad was unlikely to be abusive, they argued, because "American foreign policy is infused with an unusually high degree of morality."[128] Abu Ghraib showed otherwise, as do subsequent investigations of the prison scandal that have protected the high-level officials—military and civilian—who authorized abusive interrogation techniques. Why do conservatives, traditionally distrustful of human nature and, in the past, supportive of limited government and the need for checks and balances, display such unwavering dependence on the national government, military force, nation-building, and presidential power?

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128. Kagan and Kristol, *Present Dangers*, 22.

Neocons originally developed as a counterforce to critically analyze overblown and unrealistic programs that liberals pursued for social reforms. During that period of the 1960s and 1970s, neocons wrote incisive and thoughtful studies that warned about "the dangers of ambitious social engineering, and how social planners could never control behavior or deal with unanticipated consequences."[129] Given that skepticism, how could neocons in backing the Iraq War "expect to bring democracy to a part of the world that has stubbornly resisted it and is virulently anti-American to boot."[130] In preparing for war—or in fact *not* preparing for war—the neocons mixed a dangerous brew of ignorance and arrogance. Their presumption (and it was no more than that) that Iraqis would respond to America's invasion as a liberation, not an occupation, was one of many analytical blunders.

Distrust of executive war power has a constitutional base: the framers' fear that presidents would use military power for personal or partisan motivations, not for the national interest. There is a second reason to distrust executive war power. It comes from America's political experience. The second Iraq War underscores what should have been learned from the Korean and Vietnam Wars: the limited competence within the executive branch to plan and execute a successful war. Miscalculations, errors of intelligence, and false statements have haunted the second Iraq War. The mistakes came not from the military but from civilian leadership, especially at the level of the White House, the Justice Department, and the Defense Department.

On November 10, 2005, National Security Adviser Stephen Hadley decided to address a subject that had been debated in the press: "the notion that somehow the administration manipulated prewar intelligence about Iraq." He said that administration statements "about the threat posed by Saddam Hussein were based on the aggregation of intelligence from a number of sources, and represented the collective view of the intelligence community. Those judgments were shared by Republicans and Democrats alike." He pointed out that 77 senators, representing both parties, "all believed, based on the same intelligence, that Saddam Hussein had weapons of mass destruction and

129. Francis Fukuyama, "The Neoconservative Moment," *The National Interest*, Summer 2004, 60.
130. Ibid.

imposed an enormous threat to his neighbors and to the world at large." For critics of the administration "to ignore their own past statements" about the existence of WMDs "exposes the hollowness of their current attacks."[131] Hadley insisted that the intelligence before going to war against Iraq "was clear in terms of the weapons of mass destruction."[132]

That is false. The intelligence about WMDs was far from clear, nor is it true that lawmakers had the "same intelligence" as the executive branch. Before voting on the Iraq Resolution in October 2002, members of Congress asked the administration to prepare a National Intelligence Estimate (NIE) on Iraq. The intelligence agencies responded by producing a report on WMDs. To Hadley, the case that was brought to President Bush, "in terms of the NIE, and parts of which have been made public, was a very strong case."[133] The unclassified version of the NIE, available on the CIA's web site (www.cia.gov), was extremely misleading. The second sentence of the "key judgments" section, which forms the opening paragraphs of the NIE, stated unequivocally: "Baghdad has chemical and biological weapons . . . ." When the reader turns to the analytical sections that follow, however, *nothing* supports that flat and powerful assertion. Instead, Iraq was merely said to have "the ability" to produce chemical warfare agents and "the capability" to produce biological warfare agents.[134] None of those cautious and highly qualified statements justifies the unqualified claim that Iraq "has chemical and biological weapons."

When President Bush addressed the nation on October 7, 2002, shortly before lawmakers prepared to vote on the Iraq Resolution, he said that Iraq "was required to destroy its weapons of mass destruction, to cease all development of such weapons, . . ." The Iraqi regime, he claimed, "has violated all of those obligations."[135] That was

131. Press Briefing by National Security Advisor Steve Hadley, November 10, 2005, 3; http://www.whitehouse.gov/news/releases/2005/11/print/20051110-7.html.

132. Ibid., 5.

133. Ibid., 6. For newspaper coverage of Hadley's comments, see Peter Baker, "Bush Aide Fires Back at Critics On Justification for War in Iraq," *Washington Post*, November 11, 2005, A1; Dana Milbank and Walter Pincus, "Asterisks Dot White House's Iraq Argument," *Washington Post*, November 12, 2005, A1.

134. Fisher, "Deciding on War Against Iraq,"408.

135. *Weekly Compilation of Presidential Documents*, vol. 38, 1716.

false. Inspections after the war began demonstrated conclusively that the WMDs had been destroyed and had not been replaced. Bush said flatly: "It possesses and produces chemical and biological weapons."[136] This was another false statement, reflecting the assertion that had been included in the NIE. What the Bush administration did in mobilizing public and congressional support for military action against Iraq was to concentrate on what might be, or could be, or used to be, than on what actually existed.[137]

A day after Hadley's press briefing in 2005, President Bush gave a Veterans Day speech in Pennsylvania. He said that "it's perfectly legitimate to criticize my decision" to go to war against Iraq, but "it is deeply irresponsible to rewrite the history of how that war began. Some Democrats and anti-war critics are now claiming we manipulated the intelligence and misled the American people about why we went to war." The stakes in the war on terrorism "are too high," he said, "and the national interest is too important, for politicians to throw out false charges. These baseless attacks send the wrong signal to our troops and to an enemy that is questioning America's will."[138] False charges have indeed been made, especially the assertions that Iraq possessed chemical and biological weapons at the time America invaded.

Vice President Dick Cheney also rebuked the critics of the Iraq War. On November 16, 2005, at a dinner sponsored by a conservative research organization, he said that the accusation that the Bush administration distorted intelligence to justify war against Iraq represented "one of the most dishonest and reprehensible charges ever aired in this city." The morale of US troops could be undermined by those who suggest "they were sent into battle for lies." He added: "The president and I cannot prevent certain politicians from losing their memory, or their backbone."[139]

136. Ibid.

137. Fisher, "Deciding on War Against Iraq."

138. "President Commemorates Veterans Day, Discusses War on Terror," Tobyhanna, PA, November 11, 2005, 7; http://www.whitehouse,gov/news/releases/2005/11/print/20051111-1.html. See also Richard W. Stevenson, "Bush Contends Partisan Critics Hurt War Effort," *New York Times*, November 11, 2005, A1; Linton Weeks and Peter Baker, "Bush Spars With Critics of the War," *Washington Post*, November 11, 2005, A1.

139. Michael A. Fletcher, "Cheney Denounces Critics of Iraq War," *Washington Post*, November 17, 2005, A8. See also Michael A. Fletcher, "Iraq Critics Meet Familiar Reply," *Washington Post*, November 18, 2005, A6.

In a speech on November 21, 2005, Cheney warned that those who argue that Americans were sent into battle based on a lie are engaging in "revisionism of the most corrupt and shameless variety." While admitting that, in hindsight, US intelligence was flawed, "any suggestion that prewar information was distorted, hyped or fabricated by the leader of the nation is utterly false."[140] There should be no question that the prewar information was distorted, hyped, and fabricated. The October 2002 NIE prepared by the intelligence community is plain evidence of that, and Bush repeated those false claims in his Cincinnati speech. Cheney's speech, however, is carefully nuanced. His speech did not, on its face, reject the notion that prewar information was distorted, hyped, or fabricated. He merely rejected the claim that such distortions were done *by the leader of the nation*. US citizens are accustomed to reading and rereading every administration statement.

The remarkable fact about US intelligence used to justify the war against Iraq was not that some of it was false. Every country has gone to war on the basis of intelligence that was partly true and partly false. The second Iraq War is unique in that *every single bit of intelligence* used to justify military action was false. Whether it was the assertion that a link existed between Iraq and Al Qaeda, or that Iraq purchased aluminum tubes to enrich uranium for the purpose of reconstituting its nuclear weapons program, or that Iraq tried to buy uranium oxide (yellowcake) from a country in Africa, or that Iraq possessed chemical and biological weapons, or that it had mobile labs to produce germ warfare agents, or that it had unmanned aerial vehicles (drones) to disperse biological warfare agents—every single one of these claims was false.[141]

When Secretary of State Colin Powell appeared before the UN Security Council on February 5, 2003 to make the case for war against Iraq, he said that "every statement I make today is backed up by sources, solid sources. These are not assertions. What we're giving you are facts and conclusions based on solid

140. Elisabeth Bumiller, "Cheney Sees 'Shameless' Revisionism on War," *New York Times*, November 22, 2005, A1. See also Michael A. Fletcher and Jim Vandehei, "Cheney Again Assails Critics of War," *Washington Post*, November 22, 2005, A1; Dana Milbank, "Opening the Door to Debate, and Then Shutting It," *Washington Post*, November 22, 2005, A4.

141. Fisher, "Justifying War against Iraq," 289–313.

intelligence."[142] What he gave, however, were not facts but assertions, and false assertions at that. After learning that his detailed description of Iraqi weapons programs turned out to be based on false information, he now regards his performance at the Security Council to be a permanent "blot" on his record of public service.[143]

8. Conclusions

The second Iraq War reminds us of what should have been learned by taking seriously the framers' concerns about the war power, the constitutional text, judicial decisions, and such military conflicts as the Korean and Vietnam Wars. The framers valued deliberation, a republican form of government, and popular control. They had good reason to distrust executive wars. We have good reason plus the experience of presidential wars that have been tragically conceived and executed. Various administrations, Republican and Democrat, have lied their way into wars and displayed incompetence about the conduct of war. Once again an administration, this time in Iraq, has opted for military force without understanding its limits or its consequences. There is no possibility for spreading democracy abroad if there is no respect and understanding for it in the United States.

Congressional debate on the Iraq Resolution of October 2002 contains some similarities to the Tonkin Gulf Resolution of August 1964. Both resolutions transferred to the president the sole decision to go to war and determine its scope and duration. Both resolutions were based on false information. Both occurred in the middle of an election year: a presidential election in 1964 and congressional elections in 2002. Both presidents—a Democrat in 1964 and a Republican in 2002—used military operations in an effort to enhance their party's electoral chances. In each case, lawmakers chose to trust in the president rather than in themselves.

142. Transcript as printed in *New York Times*, February 6, 2003, A14.

143. Steven R. Weisman, "Powell Calls His U.N. Speech A Lasting Blot on His Record," *New York Times*, September 9, 2005, A10.

Senator Chuck Hagel, a Republican from Nebraska, criticized the decision of President Bush, Vice President Cheney, and others in the administration to attack opponents of the Iraq War. He insisted that the administration had to understand that "each American has a right to question our policies in Iraq and should not be demonized for disagreeing with them." To question your government "is not unpatriotic," he said. Instead, to not question your government "is unpatriotic." He regarded the Vietnam War as a national tragedy "partly because members of Congress failed their country, remained silent, and lacked the courage to challenge the administrations in power until it was too late." Hagel counseled the administration not to divide the country with rhetorical attacks.[144] The task of the Bush administration has evolved into the more modest goal of stabilizing Iraq to permit the removal of US forces ■

144. Glenn Kessler, "Hagel Defends Criticisms of Iraq Policy," *Washington Post*, November 16, 2005, A6.

References

1. Acheson, Dean. *Present at the Creation*. New York: W.W. Norton, 1969.
2. Ali, Tariq. *The Clash of Fundamentalisms; Crusades, Jihads and Modernity*. London: Verso, 2003.
3. ———. *Bush in Babylon: The Recolonisation of Iraq*. London: Verso, 2003.
4. Beschloss, Michael R., ed. *Taking Charge: The Johnson White House Tapes, 1963–64*. New York: Touchstone, 1998.
5. Blackstone, William. *Commentaries on the Laws of England* , vol. 2 (1803).
6. Bloom, Allan. *The Closing of the American Mind*. New York: Simon and Schuster, 1987.
7. Bok, Sissela. *Lying: Moral Choice in Public and Private Life*. New York: Pantheon Books, 1978.
8. Boyd, Julian, ed. *The Papers of Thomas Jefferson*, vol. 15. Princeton: Princeton University Press, 1958.
9. Carter, Clarence Edwin, ed. *The Territorial Papers of the United States*, vol. 4 (1936).
10. Corwin, Edward S. "The President's Power." *New Republic*, January 29, 1951.
11. Crovitz, L. Gordon. "How Ronald Reagan Weakened the Presidency." *Commentary*, September 1988.
12. Deutsch, Kenneth L., and John A. Murley, eds. *Leo Strauss, the Straussians, and the American Regime*. Lanham, MD: Rowman & Littlefield, 1999.
13. Devins, Neal, and Louis Fisher. "The Steel Seizure Case: One of a Kind?" *Constitutional Commentary* 19 (2000).
14. Dorrien, Gary. *The Neoconservative Mind: Politics, Culture, and the War of Ideology*. Philadelphia: Temple University Press, 1993.
15. Drew, Elizabeth. "The Neocons in Power." *New York Review of Books*, June 12, 2003.
16. Drury, Shadia B. *Leo Strauss and the American Right*. New York: St. Martin's Press, 1999.

17. Elliot, Jonathan, ed. *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 2. Washington, DC: 1836–45.

18. Erman, John. *The Rise of Neoconservatism: Intellectuals and Foreign Affairs, 1945–1994*. New Haven: Yale University Press, 1995.

19. Farrand, Max, ed. *The Records of the Federal Convention of 1787*, vol. 2. New Haven: Yale University Press, 1937.

20. Fisher, Louis. *President and Congress*. New York: The Free Press, 1972.

21. ———. *Constitutional Conflicts between Congress and the President*, 4th ed. Lawrence: University Press of Kansas, 1997.

22. ———. "Unchecked Presidential Wars." 148 *University of Pennsylvania Law Review* 1637 (2000).

23. ———. *Congressional Abdication on War and Spending*. College Station: Texas A&M University Press, 2002.

24. ———. "Deciding on War Against Iraq: Institutional Failures." *Political Science Quarterly* 118 (2003).

25. ———. *The Politics of Executive Privilege*. Durham: Carolina Academic Press, 2004.

26. ———. *Presidential War Power*, 2d ed. Lawrence: University Press of Kansas, 2004.

27. ———. "Judicial Review of the War Power." *Presidential Studies Quarterly* 35 (2005).

28. ———. "Justifying War Against Iraq." In *Rivals for Power: Presidential-Congressional Relations*, 3d ed., edited by James A. Thurber, 289–313. Lanham, MD: Rowman & Littlefield, 2005.

29. ———. *Military Tribunals and Presidential Power*. Lawrence: University Press of Kansas, 2005.

30. ———. "Scholarly Support for Presidential Wars," *Presidential Studies Quarterly* 35 (2005).

31. Fitzpatrick, John C., ed. *The Writings of George Washington*, vol. 33. Washington, DC: Government Printing Office, 1931–44.

32. Fukuyama, Francis. "The Neoconservative Moment." *The National Interest,* Summer 2004.

33. Hamilton, Alexander. "Pacificus No. 1," June 29, 1793. Reprinted in *The Works of Alexander Hamilton,* vol. 4., edited by Henry Cabot Lodge. New York: G. Putnam's, 1904.

34. Hersh, Seymour. *Chain of Command: The Road From 9/11 to Abu Ghraib.* New York: HarperCollins, 2004.

35. Hertsgaard, Mark. *On Bended Knee: The Press and the Reagan Presidency.* New York: Farrar Straus Giroux, 1988.

36. Hunt, Gaillard, ed. *The Writings of James Madison,* vol. 6. New York: G. Putnam's, 1906–1910.

37. Jung, Hwa Yol. "Leo Strauss's Conception of Political Philosophy: A Critique." *Review of Politics* 29 (1967).

38. Kagan, Robert, and William Kristol, eds. *Present Dangers: Crisis and Opportunity in American Foreign and Defense Policy* . San Francisco: Encounter Books, 2000.

39. Kaplan, Lawrence F., and William Kristol. *The War Over Iraq: Saddam's Tyranny and America's Mission.* San Francisco: Encounter Books, 2003.

40. Kosterlitz, Julie. "The Neoconservative Moment." *National Journal,* May 17, 2003.

41. Krauthammer, Charles. "The Price of Power." *The New Republic* , February 9, 1987.

42. Kristol, William, and Robert Kagan. "Toward a Neo-Reaganite Foreign Policy." *Foreign Affairs* 75 (1996).

43. Lampert, Laurence. *Leo Strauss and Nietzsche.* Chicago: University of Chicago Press, 1996.

44. Ledeen, Michael A." A Republican Contract with the World." *Weekly Standard,* May 13, 1996.

45. Locke, John. *Second Treatise on Civil Government* (1690).

46. Mann, James. *Rise of the Vulcans: The History of Bush's War Cabinet.* New York: Viking, 2004.

47. McMaster, H.R. *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff and the Lies That Led to Vietnam.* New York: HarperPerennial, 1998.

48. Micklethwait, John, and Adrian Wooldridge. *The Right Nation: Conservative Power in America,* New York: Penguin Press, 2004.

49. Muravchik, Joshua. *Exporting Democracy: Fulfilling America's Destiny.* Washington, DC: AEI Press, 1992 ed.

50. Neustadt, Richard E. *Presidential Power,* paperback ed. New York: Signet Book, 1964.

51. Norton, Anne. *Leo Strauss and the Politics of American Empire.* New Haven: Yale University Press, 2004.

52. Pfiffner, James. "Did President Bush Mislead the Country in His Arguments for War with Iraq?" *Presidential Studies Quarterly* 34 (2004).

53. Podhoretz, Norman. "Making the World Safe for Communism." *Commentary,* April 1976.

54. Ponnuru, Ramesh. "Getting to the Bottom of This 'Neo' Nonsense." *National Review,* June 16, 2003.

55. Schlesinger, Arthur M., Jr. *The Imperial Presidency.* Boston: Houghton Mifflin Co., 1973.

56. Strauss, Leo. *Thoughts on Machiavelli.* Glencoe, IL: The Free Press, 1958.

57. ———. "An Epilogue." In *Essays on the Scientific Study of Politics,* edited by Herbert J. Storing, 307. New York: Holt, Rinehart and Winston, 1962.

58. ———. *What Is Political Philosophy?* Chicago: University of Chicago Press, 1988 ed.

59. Susser, Bernard. "Leo Strauss: The Ancient as Modern." *Political Studies* 36 (1988).

60. Third Geneva Convention, Protection of War Victims, TIAS [US Treaties and Other International Agreements] 3328, 3330, 3384, 3393 (Articles 13, 17, 87, 99).

61. Treanor, William Michael. "Fame, the Founding, and the Power to Declare War." 82 *Cornell Law Review* 695 (1997).

62. "Were We Wrong?" *The New Republic*, June 28, 2004.

63. Wright, Benjamin Fletcher, ed. *The Federalist*. Cambridge, MA: Harvard University Press, 1961.

64. Wurmser, David. *Tyranny's Ally: America's Failure to Defeat Saddam Hussein*. Washington, DC: AEI Press, 1999.

65. Yoo, John C. "The Continuation of Politics by Other Means: The Original Understanding of War Powers." 84 *California Law Review* 167, 170 (1996).