

## Comment

### **COMMENT ON PROFESSOR YOO, *ADMINISTRATION OF WAR***

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Professor John Yoo performs a valuable service by attempting to apply the concepts of administrative law to civil-military relations. “Administrative law scholarship should pay attention to the armed forces,” he asserts, “not just because it performs the most important function of the executive branch, but because it is the largest part of the executive branch.”<sup>1</sup> What he does not remind readers, more importantly, is that control of armed force has been an issue since the beginning of government—because those who have the power to coerce also possess at least the potential to control society.

There is also benefit in applying principle-agent theory to improve civilian control in the executive branch. Professor Yoo notes persuasively that, in dealing with the military, the president possesses sufficient removal authority<sup>2</sup>—a chief tool of executive control—even if that power is in part limited by, among other things, the military’s iconic status and special legitimacy in American society, factors that Yoo neglects. Indeed, he writes that “[r]emoval . . . may be both too blunt and too narrow a tool to improve civil-military relations,”<sup>3</sup> although Secretary of Defense Robert Gates has used it beneficially since 2006, whereas his predecessors foreswore it to their disadvantage.

Yet in seeking “to expand the field of inquiry” in administrative law to “the broader issue of control of the military,”<sup>4</sup> Professor Yoo

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1. John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2283 (2009).
2. *See id.* at 2292.
3. *Id.* at 2303.
4. *Id.* at 2283.

commits such fundamental errors of fact and interpretation as to invalidate his overall analysis and vitiate his suggestions.

Professor Yoo's most egregious error is to write about civilian control of the military as though it is exclusively a function of the executive branch. Most damaging is the claim that "[c]ivilian control of the military . . . is expressed nowhere in the [U.S. Constitution] except in the Commander-in-Chief Clause."<sup>5</sup> Professor Yoo must mean "expressed" in the most literal and narrow (and thus misleading) terms because civilian control of the military pervades the Constitution to the point of obsession. Article I gives Congress the power to create or disband military forces,<sup>6</sup> make rules for their governance,<sup>7</sup> define the circumstances and procedures for mobilizing the state militias (and "provide for organizing, arming, and disciplining" them),<sup>8</sup> approve appointments of officers,<sup>9</sup> raise (and deny) money,<sup>10</sup> and more.<sup>11</sup> The federal judiciary possesses wide jurisdiction over the armed forces—even if judges and justices chose not to exercise that jurisdiction for many decades after the Constitution went into effect, and then to forfeit much of that jurisdiction during the Chief Justiceship of William Rehnquist. All officers of government must swear or affirm to support the Constitution, including its preamble to "insure domestic Tranquility" and "provide for the common defense."<sup>12</sup> The Framers understood that physical control of the armed forces was impossible. They wished no single branch to be able to control the armed forces lest that branch use the military to dominate the other branches and overthrow the Constitution itself. Divided, shared, differentiated, overlapping, and sometimes conflicting authority over the armed forces is the heart of civilian control in the U.S. Constitution, and civilian control in the United States has played out that way historically.<sup>13</sup> In his writing on war powers elsewhere, Professor Yoo seems to acknowledge this.<sup>14</sup>

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5. *Id.* at 2281.

6. U.S. CONST. art. I, § 8, cls. 12–13.

7. *Id.* art. I, § 8, cl. 14.

8. *Id.* art. I, § 8, cl. 15–16.

9. *Id.* art. I, § 8, cl. 16.

10. *Id.* art. I, § 8, cl. 12.

11. *See id.* art. I, § 8, cl. 11–16.

12. *Id.* pmbl.

13. *See, e.g.,* SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 177–80, 400–27 (1957); LOUIS SMITH, *AMERICAN*

In citing Alexander Hamilton in *The Federalist Papers* as the most authoritative understanding of presidential war powers (and, by extension, civil-military relations, which nest within various war powers), Professor Yoo misleads both himself and his readers.<sup>15</sup> Hamilton's views of executive power were extreme even in the 1780s and were largely opposed by contemporaries. As Richard Beeman notes in a thoughtful new history of the making of the Constitution, Hamilton's long speech ("five to six" hours) at the constitutional convention, proposing extraordinary power and authority for the presidency, "was greeted with a deafening silence."<sup>16</sup> "Hamilton's views strayed so far from mainstream republican principles that they appeared not to merit a response. In fact, no one even rose to dispute them" and "none of [the Framers] was prepared to create the sort of 'elected monarch' envisioned by Hamilton."<sup>17</sup> At Hamilton's death, his friend and colleague Gouverneur Morris, himself a federalist who supported executive primacy and worked closely with Hamilton in Congress in the 1780s and later, admitted privately before giving Hamilton's eulogy in 1804 that Hamilton "was in principle opposed to

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DEMOCRACY AND MILITARY POWER: A STUDY OF CIVIL CONTROL OF THE MILITARY POWER IN THE UNITED STATES (1951); HOWARD WHITE, EXECUTIVE INFLUENCE IN DETERMINING MILITARY POLICY IN THE UNITED STATES 15-63 (Ayer Co. Publishers 1979) (1925); Richard H. Kohn, *Civil-Military Relations: Civilian Control of the Military*, in THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 122, 122-25 (John Whiteclay Chambers II ed., 1999); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, at 61, 61 (Richard H. Kohn ed., 1991); Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and "Civil Rights Supervision" over the Armed Forces*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, *supra*, at 405, 405-30; Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the March of Martial Law*, 77 IND. L.J. 701, 705-32 (2002); Steven L. Rearden, *Congress and National Defense, 1945-1950*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, *supra*, at 271, 271-89. For an in-depth discussion of the history of military justice, see generally JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950 (1992); 2 JONATHAN LURIE, PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 (1997).

14. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 30-142 (2005); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR x-xii (2006); *see also* Yoo, *supra* note 1, at 2293 (Professor Yoo's lumping of Congress as part of "the principal").

15. *See* Yoo, *supra* note 1, at 2280.

16. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 169 (2009).

17. *Id.*

republican and attached to monarchical government, and then his opinions were generally known and have been long and loudly proclaimed.”<sup>18</sup> As for *The Federalist Papers*, Professor Beeman echoes a common understanding among historians of the period when he writes that “they were, first and foremost, political propaganda aimed at persuading undecided voters to support the Constitution.”<sup>19</sup>

Professor Yoo begins by noting “the success of the military in gaining significant policy independence from the political leadership,” but then he claims that “this is no different than the account of a federal agency managing to prevail in pursuing its own preferences at the expense of the president or Congress.”<sup>20</sup> The military, however, is very different from other governmental agencies, not just in its size or function, but in its very institutional essence. Unlike other organizations, the military functions under a separate legal system; training is physical, harsh, demanding, and identity-stripping; its members accept the risk of death as a condition of performing their duty; they have obligations around the clock; they operate under far more unyielding and more rigid discipline than police or other security forces; the government can compel service and thus at times some members (and sometimes an overwhelming majority) serve unwillingly; the hierarchy is pyramidal, rigid, and authoritarian—more so than any other institution in society save perhaps criminal gangs; and, most importantly, its members and both the government and the American people understand and accept its unique status and fundamental differentiation from the rest of society. The system of control is *sui generis*, even beyond the Constitution’s special provisions for control and subordination; analogies to civilian agencies and their protocols of administrative control or subordination just do not fit. Thus, the statement that, “[i]f elected

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18. Entry for July 13, 1804, in 2 THE DIARY AND LETTERS OF GOUVERNEUR MORRIS, MINISTER OF THE UNITED STATES TO FRANCE; MEMBER OF THE CONSTITUTIONAL CONVENTION 456, 456 (Anne Cary Morris ed., Charles Scribner’s Sons 1888). For excellent short sketches of Hamilton, free of the advocacy of biography, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 92–114 (1993); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 32–33 (1993).

19. BEEMAN, *supra* note 16, at 407. Professor Beeman points out that the Supreme Court cited *The Federalist Papers* only once between 1790 and 1800, only fifty-eight times in the nineteenth century, and thirty-eight times in the first half of the twentieth century, but “in the last half of that century they were cited no fewer than 194 times,” suggesting that these “hurried, even frenzied political arguments” were used for judicial argument rather than as authoritative analysis of the intent and understanding of the Constitution when it was written. *Id.*

20. Yoo, *supra* note 1, at 2284.

leaders have trouble with the military, where their constitutional powers should be at their height, then their problems will be doubled with the civilian agencies<sup>21</sup> rests on flawed assumptions. Furthermore, there is often a difference between constitutional power and political reality. Since the early 1980s, the military has possessed enormous prestige across American society, whereas other federal agencies have much more limited reputations and constituencies—and thus clout—both in Congress and amongst the public.

Professor Yoo errs again when he claims that “after General MacArthur’s firing, civilian-military relations continued without many problems.” What he writes of as “strains” were often real conflicts or subtle evasion, and on occasion open warfare.<sup>22</sup>

He cites only Michael C. Desch’s work to support the statement that “leading scholars [note the plural] have observed that civilian control over the military did not suffer significant disruptions under the pressures of the Cold War.”<sup>23</sup> What Professor Yoo means by “significant disruptions” is unhelpfully imprecise. My own work, and that of Peter Feaver, Andrew Bacevich, Eliot Cohen, and others—including Dale R. Herspring, whom Professor Yoo cites in the very next footnote—demonstrate that civilian control was often highly contested during the Cold War.<sup>24</sup> Conflict occurred regularly throughout the period, and civilian officials, including President Dwight D. Eisenhower, struggled not always successfully (despite

21. *Id.* at 2295.

22. *Id.* at 2305.

23. *Id.*

24. See ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* 167–97 (2002); ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* 34–68 (2005); ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 173–207 (2002); PETER FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 180–282 (2003); DALE R. HERSPRING, *THE PENTAGON AND THE PRESIDENCY: CIVIL-MILITARY RELATIONS FROM FDR TO GEORGE W. BUSH* 409–30 (2005); Andrew J. Bacevich, *Elusive Bargain: The Pattern of U.S. Civil-Military Relations Since World War II*, in *THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II* 207, 207–64 (Andrew J. Bacevich ed., 2007); Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 *WAKE FOREST L. REV.* 341, 367–86 (1994); Richard H. Kohn, *Building Trust: Civil-Military Behaviors for Effective National Security*, in *AMERICAN CIVIL-MILITARY RELATIONS: REALITIES AND CHALLENGES IN THE NEW ERA* (Suzanne Nielsen & Don Snider eds., forthcoming 2009); Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, *NAVAL WAR C. REV.*, Summer 2002, at 8, 22–37; Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, *NAT’L INT.*, Spring 1994, at 3, 3–17.

Professor Desch's examples) to assert their policy preferences.<sup>25</sup> In June 2007, at a conference at West Point celebrating the fiftieth anniversary of Samuel Huntington's seminal book, *The Soldier and the State*, I asked a scholar of civil-military relations and the secretaries of defense whether any secretary of defense had embarked on the office fully trusting the military.<sup>26</sup> The answer was no.<sup>27</sup> All that Desch's work demonstrates is that, until the 1990s, the civilians largely won these conflicts;<sup>28</sup> it does not explore regular conflict over budgets, policy, and decisions in which the political and bureaucratic strength of the military limited civilian choices and behaviors.

Thus "poor relations" did not begin "with the election of Bill Clinton," as Professor Yoo states, but long before, although under Clinton the relationship did deteriorate dramatically, as did civilian control.<sup>29</sup>

Finally, Professor Yoo argues that uniformed judge advocates violated civilian control by opposing George W. Bush's administration on the detention of terrorist suspects and military commissions,<sup>30</sup> an argument he also made in 2007.<sup>31</sup> What voids this line of thinking is the role of Congress in civilian control and the ethical obligation of both military and legal professionals to tell the truth when testifying before Congress and when representing their clients in court, even if that means a uniformed officer must challenge the legal rulings of the executive branch. Uniformed lawyers act in a dual capacity: as military officers and lawyers. They cannot ignore or circumvent the ethics of either profession when acting in an official capacity, whether testifying on Capitol Hill or representing a client in a courtroom. This would violate civilian control of the military only if one understood civilian control as exclusively within the purview of

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25. See, e.g., Andrew J. Bacevich, *Generals Versus the President: Eisenhower and the Army, 1953-55*, in *SECURITY IN A CHANGING WORLD: CASE STUDIES IN U.S. NATIONAL SECURITY MANAGEMENT* 83, 83-99 (Volker C. Franke ed., 2002).

26. Stevenson also authored a historical study of civil-military conflict. CHARLES A. STEVENSON, *SECDEF: THE NEARLY IMPOSSIBLE JOB OF SECRETARY OF DEFENSE passim* (2006) (discussing the tenures of several secretaries of defense from Robert McNamara to Donald Rumsfeld, and the difficulties faced by every occupant of that office).

27. *Id.*

28. See, e.g., MICHAEL C. DESCH, *CIVILIAN CONTROL OF THE MILITARY* 22-38 (1999).

29. Yoo, *supra* note 1, at 2285.

30. *Id.* at 2290.

31. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terrorism*, 54 *UCLA L. REV.* 1815, 1831-45 (2007).

the executive branch. Because Congress and the federal judiciary also exercise authority over the military, officers (and not just military lawyers) complying with civilian control are merely navigating the complexities and ambiguities of civilian control as it exists in the United States historically and today.<sup>32</sup>

Contrary to Professor Yoo's assumption ("all of this has led historians and political scientists to warn of a crisis in civil-military relations"), no scholars other than Professor Yoo himself have cited uniformed lawyers' opposition, in congressional testimony or court arguments, to Bush administration legal rulings and arguments, as evasion by the military of civilian control.<sup>33</sup>

In the end, because of these errors of assumption, fact, and interpretation, Professor Yoo has failed to make administrative law add to our understanding of civil-military relations in general and civilian control of the military in particular. His contribution is to raise the possibility, and perhaps future scholarship will contribute. But until then, we are left to rely on history, political science, sociology, anthropology, other subdisciplines of law, psychology, business, and journalism, all of which in recent years have deepened our understanding of how civilian control should operate, and how difficult it is in practice, both in the past and in the United States today.

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32. This point is made clearly in as classic a text as Huntington's, HUNTINGTON, *supra* note 13, at 7–18, 163–92, and in as recent a memoir as that of former Chairman of the Joint Chiefs of Staff Richard B. Myers, RICHARD B. MYERS, EYES ON THE HORIZON: SERVING ON THE FRONT LINES OF NATIONAL SECURITY 7, 270–71 (2009); *see also* SARAH SEWALL & JOHN P. WHITE, PARAMETERS OF PARTNERSHIP: U.S. CIVIL-MILITARY RELATIONS IN THE 21ST CENTURY 22–23, 42–45 (2009).

33. Yoo, *supra* note 1, at 2291.