AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

**Memoranda on Standards of Conduct of Interrogation (“Torture Memos”)**

In the months after the attacks of September 11, 2001, advisors to President George W. Bush asked the Office of Legal Counsel (OLC) within the Department of Justice to provide legal guidance on a variety of questions relating to the rapidly expanding war on terrorism. Among the questions asked were the legal limits on interrogation methods that the United States might use on suspected terrorists and those captured on the battlefields of Afghanistan. The OLC produced two memos to the then-White House legal counsel Alberto Gonzales. One, by Assistant Attorney General Jay Bybee, examined the interpretation and limits of treaty and statutory prohibitions on torture. Another, by Deputy Assistant Attorney General John Yoo, further examined the treaty obligations of the United States and the jurisdiction of the International Criminal Court over the interrogation of al Qaeda operatives. Both offered a relatively narrow interpretation of the treaty and statutory provisions, and both offered an additional constitutional analysis that limited the extent to which Congress could direct how the president conducted the military campaign.

The legal interpretation of the political appointees within the OLC was met with some consternation among the career legal staff within the Department of Justice and the Pentagon, as well as from some other political appointees. In the summer of 2004, after revelations of the abuse of prisoners in military custody in Iraq became public, these so-called torture memos were leaked to the press. By then, Bybee had left the OLC for a seat on a federal circuit court, Yoo had returned to academia, and the White House was in the midst of a reelection campaign. Under international and domestic pressure, President Bush quickly emphasized that the administration was against torture. Gonzales distanced himself and the White House from the memos. He announced that the memos had been withdrawn, and he directed the OLC to produce a new opinion on legal standards affecting interrogations. In December 2004, Acting Assistant Attorney General Daniel Levin produced a new opinion, which was made public. Its broadened definition of torture was to guide administration policy relating to interrogations. After Levin’s departure in 2005, the OLC produced new opinions, which were not publicly released, that once again shrank the definition of torture under existing statutes and treaties. These opinions indicated that a wider range of interrogation techniques was legally acceptable.*[[1]](#footnote-1)* Does the Levin memo disavow the constitutional analysis in the Bybee and Yoo memos?

The Bybee memo cites the Supreme Court in *Johnson* v. *Eisentrager* (1950) as recognizing implied presidential powers that are “necessary and proper” to carrying out the “enumerated powers” in Article II of the U.S. Constitution. The language and structure also mirror the constitutional text in Article I. Consider how the Supreme Court has understood the scope of the necessary and proper clause of Article I after the New Deal. What are the implications of that characterization of presidential powers? Are implied powers more confined in the context of separation of powers than they are in the context of federalism?

The constitutional authority of Congress to limit how the president may use the military forces that Congress supplies to him has been a recurrent issue. During World War I, former president William Howard Taft argued that “Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.”*[[2]](#footnote-2)* After World War II, Cold War liberals beat back conservative proposals to curtail the president’s authority to station troops abroad. During the waning days of the Vietnam War, Congress sought to prevent the use of American air and ground forces in neighboring Cambodia. During the Reagan administration, proposals to prohibit the president from making first use of nuclear weapons were made, and defeated. Having appropriated funds to build weapon systems or create an army, can Congress direct how the president can use those instruments of war? Or do those decisions fall within the discretion of the president as commander in chief?

Jay S. Bybee, Memo to Alberto R. Gonzales, Counsel to the President(2002)[[3]](#footnote-3)

You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by ­Sections 2340–2340A of Title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside the United States. We conclude below that ­Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. . . .

. . .

Even if an interrogation method arguably were to violate Section 2340A, 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 military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

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. . . [T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. Because both “[t]he executive power and the command of the military and naval forces is vested in the President,” the Supreme Court has unanimously stated that it is “the President alone who is constitutionally invested with the entire charge of hostile operations.” Hamilton v. Dillin, 88 U.S. 73, 87 (1874) (emphasis added). That authority is at its height in the middle of a war.

In light of the President’s complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President’s ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. . . .

In order to respect the President’s inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. As our Office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war. . . .

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It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President’s Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants. Even were we to accept this argument, however, we conclude that the Department of Justice could not . . . enforce Section 2340A against federal officials acting pursuant to the President’s constitutional authority to wage a military campaign.

Indeed, in a different context, we have concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President’s constitutional powers. This Office, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. . . . Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President’s own constitutional authority. If Congress could do so, it could control the President’s authority through the manipulation of federal criminal law.

. . . The President’s constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders’ intention to create a federal government “clothed with all the powers requisite to the complete execution of its trust.” The Federalist No. 23. . . . Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As ­Hamilton explained in arguing for the Constitution’s adoption, because “the circumstances which may affect the public safety” are not “reducible within certain determinate limits,” it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.

. . .

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen ­emergencies. . . . This Office has long understood the ­Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. See, e.g., Memorandum for Charles W. Colson, Special Counsel to the President, from ­William H. Rehnquist, ­Assistant Attorney ­General, Office of Legal Counsel, Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries (May 22, 1970). . . . The implication of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.

As the Supreme Court has recognized, the Commander-­in-Chief power and the President’s obligation to protect the nation imply the ancillary powers necessary to their successful exercise. “The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution.” Johnson v. Eisentrager, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President’s complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. [See] the Prize Cases (1863). . . .

One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy. . . .

Any effort of Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. . . . Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

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John Yoo, Memo to William Haynes II, General Counsel of the Department of Defense (2003)[[4]](#footnote-4)

You have asked our Office to examine the legal standards governing military interrogations of alien unlawful combatants held outside the United States. You have requested that we examine both domestic and international law that might be applicable to the conduct of those interrogations.

. . . [C]riminal statutes, if they were misconstrued to apply to the interrogation of enemy combatants, would conflict with the Constitution’s grant of the Commander in Chief power solely to the President.

. . .

. . . The September 11, 2001 terrorist attacks marked a state of international armed conflict between the United States and the al Qaeda terrorist organization. Pursuant to his Commander-in-Chief power, as supported by an act of Congress, the President has ordered the Armed Forces to carry out military operations against al Qaeda, which includes the power both to kill and to capture members of the enemy. Interrogation arises as a necessary and legitimate element of the detention of al Qaeda and Taliban members during an armed conflict.

. . .

. . . [T]he text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to protect the security of the United States. The decision to deploy military force in the defense of U.S. interests is expressly placed under Presidential authority by the Vesting Clause . . . and by the ­Commander-in-Chief Clause. . . . The framers understood the Commander-in-Chief Clause to grant the President the fullest range of power recognized at the time of the ratification as belonging to the military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the “executive Power shall be vested in a President of the United States of America.” This sweeping grant vests in the President the “executive power” and contrasts with the specific enumeration of the powers—those “herein”—granted to Congress in Article I. Our reading of the constitutional text and structure are confirmed by historical practice, in which Presidents have ordered the use of military force more than 100 times without congressional authorization, and by the functional consideration that national security decisions require a unity in purpose and energy that characterizes the Presidency alone.

As the Supreme Court has recognized, the ­Commander-in-Chief power and the President’s obligation to protect the nation imply the ancillary powers necessary to their successful exercise. . . . In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. . . . The President’s complete discretion in exercising the ­Commander-in-Chief power has been recognized by the courts. In the Prize Cases (1863) . . . the Court explained that whether the President “in fulfilling his duties as Commander in Chief” had appropriately responded to the rebellion of the southern states was a question “to be decided by him” and which the Court could not question, but must leave to “the political department of the Government to which this power was entrusted.” . . .

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy. . . . It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. . . . Recognizing this authority, Congress has never attempted to restrict or interfere with the President’s authority on this score.

. . .

[T]he Fifth Amendment was not designed to restrict the unique war powers of the President as Commander in Chief. As long ago as 1865, Attorney General Speed explained the unquestioned rule that, as Commander in Chief, the President waging a war may authorize soldiers to engage in combat that could not be authorized as a part of the President’s role in enforcing the laws. . . . As Attorney General Speed concluded, the Due Process Clause has no application to the conduct of a military campaign:

That portion of the Constitution which declares that “no person shall be deprived of his life, liberty, or property without due process of law,” has such direct reference to, and connection with, trials for crime or criminal prosecutions that comment upon it would seem to be unnecessary. Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions. . . . The argument that flings around offenders against the laws of war these guarantees of the Constitution would convict all the soldiers of our army of murder; no prisoners could be taken and held; the army could not move. The absurd consequences that would of necessity flow from such an argument show that it cannot be the true construction—it cannot be what was intended by the framers of the instrument. One of the prime motives for the Union and a federal government was to confer the powers of war. If any provisions of the Constitution are so in conflict with the power to carry on war as to destroy and make it valueless, then the instrument, instead of being a great and wise one, is a miserable failure, a felo de se.

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. . . If each time the President captured and detained enemy aliens outside the United States, those aliens could bring suit challenging the deprivation of their liberty, such a result would interfere with and undermine the President’s capacity to protect the Nation and to respond to the exigencies of war.

The Supreme Court has repeatedly refused to apply the Due Process Clause or even the Just Compensation Clause to executive and congressional actions taken in the direct prosecution of a war effort against enemies of the Nation. . . .

. . .

[E]ven if the Fifth Amendment applied to enemy combatants in wartime, it is clear that . . . the Fifth Amendment does not operate outside the United States to regulate the executive’s conduct toward aliens. . . . As the Supreme Court explained in [­Johnson v.] Eisentrager (1950), construing the Fifth Amendment to apply to aliens who are outside the United States and have no connection to the United States:

would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and “werewolves” could require the American Judiciary to assure them freedom of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against “unreasonable” searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments. Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view.

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As the Supreme Court has recognized, . . . the President enjoys complete discretion in the exercise of his Commander-in-Chief authority in conducting operations against hostile forces. Because both “[t]he executive power and the command of the military and naval forces is vested in the President,” the Supreme Court has unanimously stated that it is “the President alone [] who is constitutionally invested with the entire charge of hostile operations.” Hamilton v. Dillin (1874).

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In the area of foreign affairs and war powers in particular, the avoidance canon has special force. In contrast to the domestic realm, foreign affairs and war clearly place the President in the dominant constitutional position due to his authority as Commander in Chief and Chief Executive and his plenary control over diplomatic relations. There can be little doubt that the conduct of war is a matter that is fundamentally executive in nature, the power over which the Framers vested in a unitary executive. . . . Correspondingly, during war Congress plays a reduced role in the war effort and the courts generally defer to executive decisions concerning the conduct of hostilities.

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In order to respect the President’s inherent constitutional authority to direct a military campaign against al Qaeda and its allies, general criminal laws must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress cannot interfere with the President’s exercise of his authority as Commander in Chief to control the conduct of operations during a war. . . . As we have discussed above, the President’s power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. Any construction of criminal laws that regulated the President’s authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President’s constitutional authority. Moreover, we do not believe that Congress enacted general criminal provisions such as the prohibitions against assault, maiming, interstate stalking, and torture pursuant to any express authority that would allow it to infringe on the President’s constitutional control over the operation of the Armed Forces in wartime. In our view, Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. In fact, the general applicability of these statutes belies any argument that these statutes apply to persons under the direction of the President in the conduct of war.

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Even if these statutes were misconstrued to apply to persons acting at the direction of the President during the conduct of war, the Department of Justice could not enforce this law or any of the other criminal statutes applicable to the special maritime and territorial jurisdiction against federal officials acting pursuant to the President’s constitutional authority to direct a war. Even if an interrogation method arguably were to violate a criminal statute, the Justice Department could not bring a prosecution because the statute would be unconstitutional as applied in this context. . . .

. . . Any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former’s emphasis on covert operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent future attacks upon the United States and its citizens. Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that would prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

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Daniel Levin, Memo to James B. Comey, Deputy Attorney General (2004)[[5]](#footnote-5)

Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340–2340A; international agreements, exemplified by the United Nations Convention Against Torture (the “CAT”); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

This Office interpreted the federal criminal prohibition against torture—codified at 18 U.S.C. §§ 2340–2340A. . . . The August 2002 Memorandum [the Bybee memo] also addressed a number of issues beyond the interpretation of those statutory provisions, including the President’s Commander-in-Chief power, and various defenses that might be asserted to avoid potential liability under sections 2340–2340A. . . .

Questions have since been raised, both by this Office and by others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about various aspects of the statutory analysis, in particular the statement that “severe” pain under the statute was limited to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” . . . We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004. At that time, you directed this Office to prepare a replacement memorandum. Because of the importance of—and public interest in—these issues, you asked that this memorandum be prepared in a form that could be released to the public so that interested parties could understand our analysis of the statute.

This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President’s ­Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.

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The Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.

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1. On the interrogation memos, see also Jack Goldsmith, The Terror Presidency (New York: W. W. Norton, 2008); Jane Mayer, The Dark Side (Boston: Anchor Books, 2008); John Yoo, War by Other Means (Washington, DC: Atlantic Monthly Press, 2006); Karen J. Greenberg and Joshua L. Dratel, eds., The Torture Papers (New York: Cambridge University Press, 2005). [↑](#footnote-ref-1)
2. William Howard Taft, “The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government,” Yale Law Journal 25 (1915): 610. [↑](#footnote-ref-2)
3. Excerpt taken from Office of Legal Counsel, Re: Standards for Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (August 1, 2002). [↑](#footnote-ref-3)
4. Excerpt taken from Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003). [↑](#footnote-ref-4)
5. Excerpt taken from Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (December 30, 2004). [↑](#footnote-ref-5)