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## Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo

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## ESSAY

# IRRATIONAL WAR AND CONSTITUTIONAL DESIGN: A REPLY TO PROFESSORS NZELIBE AND YOO

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In their recent paper, *Rational War and Constitutional Design*,<sup>1</sup> Professors Jide Nzelibe and John Yoo develop a functional account of the constitutional allocation of war powers. Eschewing the long debate over the actual meaning of the relevant provisions of the United States Constitution, they instead ask what constitutional scheme would best serve the national interest. Drawing together principal-agent theory, institutional analysis, and international relations literature, they seek to demonstrate that a rational constitutional structure of war-making would balance democratic representation with an ability to signal information to other international actors. They argue that an executive-centered system of war powers does better on both accounts and is therefore likely to lead to more legitimate, “better” wars, at least with respect to certain enemies.

Nzelibe and Yoo do a fundamental service by bringing the political science literature to bear on normative questions of constitutional design. Scholars in the field of international relations have accumulated a vast body of knowledge on the theory and practice of war and peace which is

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1. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

too often ignored in the contentious “politics by other means” of the legal academy. Despite this valuable contribution, however, we argue that Nzelibe and Yoo fail to read that literature correctly, biasing their normative conclusions. We shall suggest that a proper understanding of both principal-agent theory and the international relations literature cuts *against* executive dominance in war-making.

This Reply proceeds as follows. Part I outlines the argument of the Nzelibe and Yoo paper. Part II considers their principal-agent analysis in the context of the American political system. Part III elaborates on the “democratic peace” literature, demonstrating that it does not support the conclusions that they draw. Part IV addresses the argument that we are in a new strategic situation, such that old rules ought not apply. Part V concludes.

## I. THE ARGUMENT

Nzelibe and Yoo begin by reviewing much of the historical debate—in which Yoo has recently been a central participant—on war powers as delineated by the Constitution.<sup>2</sup> This debate has pitted those who cite the Constitution’s Article I, Section 8 Declaration of War Clause in advocating extensive congressional involvement in initiating hostilities, against advocates of executive flexibility who read Article II as providing for a unitary executive with very broad powers—in foreign affairs generally and war making in particular. Nzelibe and Yoo sidestep this debate by concluding (accurately in our view) that much of the evidence invoked in support of these positions is indeterminate, and functional considerations might thus be relevant.

In examining the functions that might be served by various constitutional interpretations, Nzelibe and Yoo introduce the idea that a system of war-making is to be evaluated not only by its ability to prevent “bad” wars (avoiding what they characterize as Type I errors), but also by its ability to authorize “good” wars (avoiding Type II errors).<sup>3</sup> Here they hint at the possibility that the current system, at least as articulated by most constitutional lawyers, has not generated enough war. They use this framework to consider whether a Congress-centered or president-centered approach would be optimal.

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2. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

3. Nzelibe & Yoo, *supra* note 1, at 2517–18. We leave aside the unanswered question as to what criteria would be utilized to evaluate the quality of a war *ex post*.

To a certain extent, the use of “Congress-centered” and “president-centered” by participants in the debate is misleading. The only issue at stake is whether *ex ante* congressional approval of major hostilities will produce better policies.<sup>4</sup> As the authors acknowledge, Congress is always free to disapprove of actions by cutting funding *ex post*.<sup>5</sup> So the issue is not really allocating powers among alternative agents but determining the sequence and timing of policymaking among multiple agents.

In considering whether a Congress-centered or president-centered regime would produce better war policy, Nzelibe and Yoo argue that the empirical evidence from American history may be “too difficult to analyze.”<sup>6</sup> Because the mechanisms of authorization have shifted across different conflicts and different periods of American history, Nzelibe and Yoo argue that there is no clear conclusion to be drawn. They criticize wars authorized by formal congressional declarations of war, such as the Mexican-American and Spanish-American wars, as well as those that involved no such formality, such as Iraq and Vietnam.<sup>7</sup> However, while they indicate that (presumably “good”) wars have proceeded without legislative involvement,<sup>8</sup> they do not mention notorious examples of “bad” conflicts initiated without legislative approval, such as the Bay of Pigs incident of 1961 or the funding of the Nicaraguan Contras through weapons sales to Iran in the 1980s. The thrust of their claim is that pro-Congress scholars have not produced data showing *ex ante* congressional authorization results in better war policy, and in this way they subtly seek to shift the burden of proof to those scholars who believe that executive centrality is *not* superior.

Nzelibe and Yoo treat the allocation of war powers as a Janus-faced question involving both international and domestic dimensions. At the domestic level, a democratic political order ought to ensure that decisions about war are made in accordance with the will of the public. On the international plane, the process of deciding whether to go to war communicates information to other states. Drawing on the “democratic peace” literature, the authors note that one reason democracies do not go to war with each other is that their governments have a distinctive ability to signal resolve. War-making in democracies requires some domestic approval (either *ex post* or *ex ante*, implicit or explicit), which communicates

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4. Indeed, even this choice is not a binary one. The extent of congressional involvement may lie on a continuum, from vague resolutions to clear declarations of war.

5. Nzelibe & Yoo, *supra* note 1, at 2521.

6. *Id.* at 2518.

7. In an earlier version of their paper, they characterized the Vietnam and Iraq wars as “mistakes.” Jibe Nzelibe & John C. Yoo, *Rational War and Constitutional Design* at 5, <http://ssrn.com/abstract=894117> (last visited Oct. 18, 2006).

8. Their example here is an anomalous one: the Cold War. Nzelibe & Yoo, *supra* note 1, at 2518.

seriousness of purpose to other states. The more extensive the authorization process that is needed on the domestic plane, the more likely it is other states will believe the signaling state is committed to the war.

This two-dimensional framework—examining domestic considerations based on principal-agent concerns and evaluating international behavior in terms of signaling—is useful. Note that, in principle, both considerations can work in the same direction. A democratic polity presumably wants to enter wars it can win. Legislative involvement in war policy may be more legitimate and may also signal to other states that the public is behind the war, which in turn leads the other side to believe the country is more committed. The net result is that opponents are likely to back down short of war or end those wars that do occur on terms more favorable to the committed state. Applying this logic to the United States, one could draw the normative conclusion that greater congressional involvement would be a good thing for both democratic representation and effective foreign policy.

Nzelibe and Yoo, however, deem the opposite to be true; they believe that internal democratic concerns militate *against* congressional involvement in *ex ante* authorization of war. The president, not Congress, is elected to represent the national interest and is putatively more accountable in matters of foreign policy.<sup>9</sup> While the president could conceivably be elected by a minority that had enough votes to control the Electoral College, Nzelibe and Yoo argue that Congress does no better in terms of representation. The president also has advantages in access to intelligence and can act quickly and decisively in foreign policy matters.

On the international plane, Nzelibe and Yoo posit that legislative involvement in authorizing war can serve as a costly signal of the resolve of the state. Going to Congress expends the president's political capital and raises audience costs should the United States back down from the conflict. By increasing the costs of yielding, a state demonstrates its willingness to commit resources. This can improve its bargaining position with other states such that opponents will be deterred or grant concessions in a crisis. Yet this shift in bargaining position requires that other actors properly receive the signals. Accordingly, the authors argue that the war powers ought to be deployed differently vis-à-vis autocracies and democracies. Because autocratic entities—in particular rogue states and terrorist groups—do not read signals as well as democracies, the additional information on national resolve conveyed by legislative authorization is of little value when dealing with such actors. Executive centrality is thus most appropriate in conflicts with non-democracies, and particularly those non-democracies that do not read signals clearly.

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9. *Id.* at 2519.

On the other hand, with respect to inter-democracy conflict, Nzelibe and Yoo approve of congressional involvement, as transparency and time for deliberation can promote peace with like-minded countries.

Nzelibe and Yoo also approve of congressional involvement where the signals sent take the form of sunk costs. When the United States deploys large numbers of troops abroad even where no immediate threat exists, it signals commitment to use them in the particular theatre. Such long-term deployments require congressional involvement. The authors prefer sunk costs to “tying hands” forms of commitment that reduce flexibility in particular crises.<sup>10</sup>

Nzelibe and Yoo conclude that a functional approach requires flexibility, but that decisions about how much legislative authorization is appropriate in any particular case should be centered in the executive. In their ideal scheme, the president would retain flexibility but have the option of seeking authorization when she believes it will be useful.

In this sense, Nzelibe and Yoo treat war powers much like the treaty power, wherein constitutional practice has developed functional forms, notably the executive agreement, to bypass the sometimes difficult process of formal Senate treaty ratification. When the president needs to signal commitment, he might choose to undertake more demanding processes of formal ratification by the Senate. Where he does not need to signal high levels of commitment, the president might pursue congressional-executive agreements.<sup>11</sup> As in treaty-making, the Nzelibe-Yoo war powers scheme envisions giving the president a choice among various options for war authorization—a choice to be informed by the exigencies of the international situation.

## II. PRINCIPAL-AGENT PROBLEMS

At the outset, we note a certain slight irony in Yoo’s deployment of functional analysis given the prevalence of historical analysis in his other work. Yoo’s previous scholarship has argued that the Constitution does not say what the majority of constitutional lawyers have historically believed it says; rather, the ambiguity of the historical literature necessitates an examination of the text and structure of the Constitution,

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10. *Id.* at 2532; see generally James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CONFLICT RESOL. 68 (1997).

11. John K. Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional–Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5, 16 (2002); see John C. Yoo, *Laws As Treaties? The Constitutionality of Congressional–Executive Agreements*, 99 MICH. L. REV 757, 775–778 (2001).

which allocate war-making power exclusively to the president.<sup>12</sup> Together, Nzelibe and Yoo now use functional methodology to reach the same conclusion.

Any normative functional analysis requires choices as to which functions matter. Nzelibe and Yoo focus on two: the domestic function of representing the public and the international function of signaling. The two are linked because presumably the public wants to enter wars that it can win. An optimal array of powers would therefore generate only those wars that (1) had public support and (2) are winnable.

One might ask whether the authors' choice to examine war powers in isolation from other foreign policy interactions is the best approach. Implicit in the analysis is the idea that only wars or serious crises are appropriate candidates for evaluation. Yet protecting the national interest *without the use of force* seems to be the optimal outcome, and the debates over the involvement of Congress seem equally applicable to lesser conflicts or those that do not result in hostilities. To a significant extent, the existence of a war or serious crisis indicates that some failure in signaling and bargaining has already occurred. Presumably, clear signals of intent would already have induced an opponent to back off or grant concessions.<sup>13</sup> As discussed below, several studies of democratic states in different levels of conflict bear upon the questions posed here. For now, we note that the functions selected by Nzelibe and Yoo drive the analysis and are not the exclusive set of relevant considerations.

In examining how the public is best represented, the authors draw on a principal-agent framework. In a democracy, the public is typically seen as the principal and the politicians the agents, whose job is to accomplish certain tasks on behalf of the public. The U.S. constitutional system involves two primary agents: Congress and the president. The authors thus frame the issue as a question of which agent is best situated to play the central role in war policy.

This is not an either-or choice, of course. The drafters of the Constitution implicitly recognized a very common solution to agency problems: employ a second agent to watch the first. Checks and balances—such as requiring multiple decisionmakers to cooperate or serve as “veto gates”<sup>14</sup> for departures from status quo policies—is one way to

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12. John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); Yoo, *The Continuation of Politics*, *supra* note 2.

13. Normally, the U.S. president has greater influence in pre-crisis foreign policy activities; Nzelibe and Yoo do not address why the president is not effective beforehand or why the executive is supposed to be more effective at a later stage.

14. A veto gate is any political institution whose assent is required to shift to a new policy. On veto gates, see Mathew Soberg Shugart & Stephan Haggard, *Institutions and Public Policy in Presidential Systems*, in *STRUCTURE AND POLICY IN PRESIDENTIAL DEMOCRACIES*

ameliorate agency problems.<sup>15</sup> These mechanisms help promote deliberation among multiple agents, which encourages them to reveal private information that might otherwise remain hidden. In addition, involving multiple agents helps advance sound interpretation of exogenously generated ambiguous information. The extensive literature on deliberation suggests that it generally leads to better policies.<sup>16</sup>

Given the advantages of deliberation and our constitutional tradition of checks and balances, Nzeliibe and Yoo must provide convincing evidence of the advantages of their proposed system of executive centrality. The authors examine the relative institutional competencies of Congress and the president and conclude that the president is better situated to be the center of a war-making system for three main reasons: the president can act quickly, has better access to information, and is more accountable to the public. We take each of their three arguments in turn.

### A. Speed

One reason *ex ante* congressional involvement may be suboptimal is that it may clash with the need to act quickly in some international crises.<sup>17</sup> Nzeliibe and Yoo assert that the president is better situated in this regard, and they imply that *ex ante* congressional involvement could hinder or delay “good” wars. They share certain assumptions with proponents of congressional *ex ante* approval, such as John Hart Ely, who argue that deliberation can also prevent or delay “bad” wars.<sup>18</sup>

Recent events, however, belie the claim that Congress plays a role in delaying war and thus call into question the assumptions on both sides of this debate. For example, Congress passed the Authorization for the Use of Military Force within a week of the September 11 attacks, yet several weeks passed before large numbers of troops were actually deployed in Afghanistan. The delay in launching the invasion of Iraq was due not to any congressional opposition or authorization process, but rather resulted from the President’s explicit choice to seek United Nations Security Council approval *after* obtaining congressional support. Recent experience thus demonstrates that unilateral presidential initiatives need not

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90 (Mathew D. McCubbins & Stephan Haggard eds., 2001); *see also* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 1–63 (2002).

15. *See* Eric A. Posner, *Agency Models in Law and Economics* 4–6 (Univ. of Chi. Law Sch., Working Paper No. 92, 2000).

16. *See, e.g.*, DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998). Even multiple sources of biased information can be desirable. Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530 (1985).

17. Nzeliibe and Yoo, *supra* note 1, at 2519.

18. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).



proceed in a speedy fashion, and that congressional approval *ex ante* may not delay essential hostilities.

### B. Information

Nzelibe and Yoo's second justification for making the president the center of the war-making scheme is a common one: the president has better access to information than does Congress.<sup>19</sup> The principal-agent model assumes that an agent has the informational advantage over the principal.<sup>20</sup> When considering which agent among several to assign a particular task, the public should be inclined to choose the agent with the best information. Most scholars assume that the president is the domestic actor with superior information, given her access to a vast array of diplomatic, military, and intelligence information resources that Congress does not control.

Nzelibe and Yoo use the lead up to the Iraq war to illustrate this information advantage. As they note, "Congress based its decision to authorize the use of force against Iraq on the intelligence and analysis presented by the Bush administration."<sup>21</sup> Yet in the same paragraph, they note that this intelligence and analysis were "all wrong."<sup>22</sup> Even if one believes the debatable proposition that poor quality information caused the Iraq misadventure, this point undermines rather than supports the argument of the essay. The risk that presidents may act on the basis of inaccurate information can be reduced by a requirement that another actor evaluate the information *ex ante*. Congressional deliberation and involvement in decisionmaking should therefore reduce Type I error. That it did not do so in this case speaks more to the partisan dominance of a single party and a president committed to attacking Iraq at all costs than to the general institutional competencies of Congress.

Indeed, one normative conclusion that could be drawn from the Nzelibe-Yoo analysis is that congressional information-gathering abilities should be enhanced. Even if the president has structural advantages in this area, a case could be made for improving the independent fact-gathering abilities of Congress so as to reduce the information asymmetry vis-à-vis the executive. One proposal might be to follow the 9/11

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19. Information quality is related to speed, of course. Speedy responses to foreign policy threats are only valuable if they are based on good information. If information quality is poor or uncertain, speed can be disastrous.

20. Posner, *supra* note 15, at 12 (discussing instances exhibiting "the great gulf between the knowledge of the agent and the information of the principal").

21. Nzelibe & Yoo, *supra* note 1, at 2524.

22. *Id.* at 2523 (citing COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 45 (2005)).

Commission's recommendations to streamline legislative organization, minimizing redundant committee structures.<sup>23</sup> Congressional investigative capacity could be enhanced as well.

Congressional involvement in the budgeting and policy evaluation processes illustrates how one might buttress legislative intelligence gathering. Distrustful of executive control over budget information, Congress set up the Congressional Budget Office in 1974 to provide objective information on government budgeting and spending.<sup>24</sup> Congress had earlier expanded its control of the General Accounting Office (now the Government Accountability Office), which was initially set up as an independent auditing and evaluation agency.<sup>25</sup> By analogy, there may be reason to think about special congressional research and analysis capacities in the national security area. Enhanced information ought to ensure that Congress can fulfill its constitutional duty of oversight.

Ultimately, Nzelibe and Yoo do not explain why the current information asymmetry ought to be accepted and sustained, rather than redressed. Though the authors might respond that the national security area is distinctive because it requires secrecy, Congress does hold closed sessions for particularly sensitive topics. Closed-door sessions offer the advantage of deliberation over policy without compromising security or undermining any valuable signals of resolve.

Nzelibe and Yoo imply that the Iraq war resulted from intelligence failures. A different conclusion is that the war stemmed not from intelligence failure but from a classic form of agency problem: executive manipulation of information to exaggerate a threat, not unlike that which led to the Gulf of Tonkin Resolution in 1964. This alternative interpretation illustrates how access to information is not the only consideration when choosing among multiple possible agents. Quality must be balanced against slack: the information advantage of a particular

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23. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT*, 419–21 (2004); see also Anne M. Joseph, *The Architecture of Smart Intelligence: Balancing Unification and Redundancy in Agency Design and Congressional Oversight*, 94 CAL. L. REV. (forthcoming 2006) (manuscript at 4, <http://ssrn.com/abstract=878223>) (last visited Oct. 18, 2006) (“The 9/11 Commission’s recommendations . . . entail a shift from decentralized, redundant agencies and . . . oversight toward centralized, unified agencies . . . and oversight”); but cf. RICHARD A. POSNER, *PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11* 9, 42–47 (2005) (9/11 Commission exaggerated benefits of centralized organization in combating terrorism).

24. Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601–602 (2000).

25. The GAO produces hundreds of writings per year. GOV'T ACCOUNTABILITY OFFICE, *PERFORMANCE AND ACCOUNTABILITY HIGHLIGHTS 25* (2005), available at <http://www.gao.gov/new.items/d062sp.pdf>. In 2004, the Congressional Research Service produced another 2000 reports and analyses and responded to tens of thousands of custom research requests. CONG. RES. SERV. ANN. REP. 5 (2004).

agent must be weighed against the possibility that the agent will pursue her own interests rather than those of the principal.<sup>26</sup> Our own intuition is that greater congressional involvement in approving the use of force abroad can exploit the president's informational advantages while reducing slack, but we need not make the positive case here, for other scholars have done so.<sup>27</sup> For now, we merely point out that the Nzelibe-Yoo analysis is incomplete and conclusory.

### C. Accountability

Beyond speed and information advantages, Nzelibe and Yoo also argue that sole executive centrality is better for democratic accountability in the context of war. Yet the authors do not contend that the president is *necessarily* more accountable to the public. Although they note that the president must answer to a national constituency, they also correctly identify the limitations of presidential accountability that stem from narrow electoral coalitions, second terms, and personal aggrandizement.<sup>28</sup> Fundamentally, the authors do not make a strong argument that presidents are more accountable than Congress, and indeed such an argument would be difficult to make. Some political science literature suggests that the House of Representatives is the governmental actor that is most responsive and accountable to public opinion.<sup>29</sup> Instead of making a case that presidents are always more accountable in the war powers context, Nzelibe and Yoo argue that (1) congressional involvement in *ex ante* authorization does not address problems with presidential accountability and (2) *ex post* involvement of Congress is sufficient to redress bad presidential decisions.

With respect to the first argument, the authors assert that because the public attributes responsibility to the executive for foreign policy, the president should be given more power in this arena.<sup>30</sup> Usually, of course, attribution of responsibility *follows* the allocation of powers and is not an

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26. Nzelibe and Yoo consider this possibility briefly—see Nzelibe & Yoo, *supra* note 1, at 2520—but do not explore the role of a second decisionmaker in eliminating agency costs.

27. See Nzelibe & Yoo, *supra* note 1, at 2514 n.5, 2517 n.11.

28. Nzelibe & Yoo, *supra* note 1, at 2520; see also Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1232–42 (2006) (documenting presidential representation of narrow electoral coalitions).

29. Thomas J. Rudolph, *Who's Responsible for the Economy? The Formation and Consequences of Responsibility Attributions*, 47 AM. J. POL. SCI. 698 (2003) (presenting data and institutional reasons for the public's attribution of greater responsibility for the economy to Congress than to the president, among other actors); James A. Stimson, Michael B. MacKuen, & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 559–60 (1995) (indicating that regression estimates show the House to be more responsive than the president, who in turn is more responsive than the Senate).

30. Nzelibe & Yoo, *supra* note 1, at 2522.

independent reason for assigning powers in the first place. More important is that Nzelibe and Yoo do not seem to recognize that *collectively* the president and Congress may be more accountable than either of them individually. The two actors represent different electoral constituencies or coalitions, or at least their constituencies are not completely coterminous. To the extent that approval must come from both Congress and the president, joint decisionmaking is accountable to a broader national constituency and to many more diverse groups.

To illustrate this point, imagine a situation wherein the president is slightly more hawkish than the median voter and Congress much more dovish. Here, allowing the president, not Congress, the exclusive role in deciding whether to go to war will produce a more "accountable" policy because the president's position is closer to that of the median voter. Nevertheless, requiring the president to bargain with Congress before initiating hostilities has the potential to move the expected policy further in the direction of the median voter. Hence, certain negotiated outcomes will be closer to the position of the median voter than allowing either actor to act alone.<sup>31</sup>

In any case, Nzelibe and Yoo's implicit assumption is that the president is *always* closer to the median voter than Congress on war policy. This assumption has no theoretical or empirical underpinning. They assume not only that the president's position is always closer to that of the median voter in absolute terms, but also that Congress and the president are always biased in the same direction. In other words, if the president is more hawkish than the median voter, Congress is even more hawkish; if the president is more dovish than the median voter, Congress is even more so. Only if this alignment were universally true would a system of sole presidential decisionmaking always be more representative than a system that requires bargaining before war.

The above discussion, like that of Nzelibe and Yoo, assumes that voter positions are fixed and exogenous to the system of war-making—in short, that the public has pre-existing preferences for particular policies. In this view, systems of representation are to be evaluated by how closely they conform to the preferences of voters. With respect to most policies and foreign policy in particular, however, this assumption is unlikely to hold.<sup>32</sup> The public is often relatively uninformed about foreign policy matters and can be persuaded to support particular causes of

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31. In our example, it is also possible to produce bargain outcomes that are further from the position of the median voter than a president-only policy. This would not be true were Congress' position closer to that of the median voter than the president's, in which case bargaining would *always* produce more accountable policy.

32. *But cf.* LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS (2000).

action by leaders.<sup>33</sup> Congressional deliberation is therefore a crucial mechanism for transmitting information to the public.<sup>34</sup> From this standpoint, the national interest, as defined by the position of the median voter, is subject to change through persuasion, rendering the meaning of accountability ambiguous. We submit, however, that democratic principles suggest that the information-transmittal function of legislative deliberation ought not be tossed aside carelessly.

With respect to the second argument on the efficacy of *post hoc* constraint by Congress, Nzelibe and Yoo depend heavily on Congress' power of the purse to restrain presidential initiatives. At best, they support this proposition only indirectly by citing a few debatable instances in which congressional pressure led the president to scale back military initiatives (e.g., Somalia). Ignored in the analysis are the pernicious effects of the path dependency of presidential actions.<sup>35</sup> *Ex post* congressional involvement can only terminate some presidential mistakes and can never recover the sunk costs of bad presidential decisions. Furthermore, it is quite conceivable that withdrawing funds from ongoing operations may be a worse choice than continuing to pay for what initially might have been a mistaken policy choice. Proposals for rapid Iraqi troop withdrawal come to mind: even some opponents of the initial decision to go to war recognize that overly hasty withdrawal could be a poor policy at later stages. Ultimately, greater congressional involvement in the initial authorization stage might prevent the downstream choice of two bad alternatives, the worse of which is to terminate funding.

Although congressional budget authority can exert some *post hoc* accountability over executive power, presidents may well be able to resist any congressional pressure. "Gambling for resurrection" is one type of agency problem that emerges from the international relations literature in this context.<sup>36</sup> Suppose an executive has initiated a conflict that has turned out to be a disaster (such as the Iraq invasion). The national

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33. GEORGE F. KENNAN, *AROUND THE CRAGGED HILL 186-92* (1993) (arguing that the public is not competent to make foreign policy judgments); Ole Holsti, *Public Opinion and Foreign Policy: Challenges to the Almond Lippman Consensus Mershon Series: Research Programs and Debates*, 36 INT'L STUD. Q. 439, 440 (1992) (summarizing literature examining the role of public opinion in foreign policy); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 558 (5th ed. 1978) ("The rational requirements of good foreign policy cannot from the outset count upon the support of public opinion whose preferences are emotional rather than rational."). But see Stephen Earl Bennett, *The Persian Gulf War's Impact on Americans' Political Information*, 16 POL. BEHAV. 179 (1994) (arguing that war increases the American public's policy awareness).

34. See generally STEPHEN HESS, *THE WASHINGTON REPORTERS* (1981).

35. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 30-53 (2004) (discussing path dependency).

36. GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* 56 (1995).

interest may require ending the conflict, but the leader may fear electoral defeat for doing so. Leaders will thus “gamble for resurrection,” escalating conflicts with a low probability of victory in the hope that they will avoid an otherwise likely electoral loss. Note how a leader who has entered into the conflict without legislative support may have even less incentive to end it; having commenced hostilities alone, the leader would be admitting error by ending the conflict in a context in which blame cannot be deflected to the legislature. *Ex ante* congressional involvement can thus decrease the incentive to “gamble for resurrection.”<sup>37</sup>

Ultimately, Nzelibe and Yoo’s arguments are unconvincing because they fail to meet the burden of proof to support an executive-centered theory. Accepting *arguendo* their conclusion that the empirical evidence is indeterminate as to which system produces the best results, it hardly follows that we ought to jettison *ex ante* approval by Congress. Their implicit effort to shift the burden of proof to pro-Congress scholars is beside the point. Unless they show that *ex ante* congressional involvement produces *worse* policy, the presumption in a democratic society must be that congressional deliberation is beneficial. Nzelibe and Yoo admit that the empirical evidence shows that a system requiring congressional involvement does no worse than an executive-centered system; it also has the significant advantage of being more democratic. Why would we choose any policy outcome produced with less democracy when the same outcome can be achieved in a more democratic manner?<sup>38</sup>

### III. SIGNALING

The second part of Nzelibe and Yoo’s argument concerns signaling and bargaining with other actors on the international level. Here, their presumption is that any democratic advantages of pre-war deliberation are offset by costs in the international sphere. Implicit in the authors’ arguments is that the United States, and more broadly any democratic state, is at a disadvantage in conflicts with non-democratic opponents when executives must consult with or secure approval from other domestic institutions. This contention is based on the alleged risk that potential opposition to or dissent from the executive’s action will undermine the resolve, and thereby the bargaining position, of the United States in crises and confrontations. The authors also presume that such dissent will handicap the ability of the United States to wage war successfully should coercive bargaining fail. Though the authors claim that “little or no empirical data” supports the idea that congressional involvement

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37. *Id.*

38. Thanks to Jim Kuklinski for this point.

leads to superior selection of wars, in fact a wealth of empirical information addresses the effectiveness of democracies in coercive bargaining and war.<sup>39</sup> These findings suggest that better outcomes emerge from consultation and consensus.

If Nzelibe and Yoo are correct in their view of prior consultation, one would expect that decision-making restraints are a hindrance to success in combat. Such logic in turn would suggest that democracies, which generally have more decision-making restraints than autocracies, would perform poorly in war. However, the opposite is true. As briefly alluded to by Nzelibe and Yoo, democratic states are highly successful in wars with non-democracies.<sup>40</sup> Indeed, democracies win over three-quarters of their wars, with the success rate ballooning to over ninety-three percent in wars they initiate.<sup>41</sup>

The key issue for Nzelibe and Yoo's argument is whether consultation with other political actors helps or hinders leaders in war and in coercive diplomacy short of war. Three scenarios essentially cover the spectrum of executive action and consultation with other domestic political actors: (1) executive action with broad domestic support, (2) executive action with domestic opposition, and (3) executive action that bypasses domestic actors entirely. The first scenario occurs when the president or executive proposes a given action or makes a threat that the political opposition supports. In such situations, Schultz reports that democracies are highly effective, indeed more successful than their nondemocratic counterparts in similar circumstances.<sup>42</sup> If the executive reaches out to legislative bodies, approval may be forthcoming either because the legislature is filled with a majority of her partisans or because the external threat engenders support for the executive by encouraging the legislature to "rally round the flag." The latter dynamic might be especially likely if the enemies are rogue states or terrorist groups, with whom Nzelibe and Yoo are most concerned.

Furthermore, solicitation of support may extend beyond the confines of national borders, with commensurate benefits. Choi reports that de-

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39. See KURT TAYLOR GAUBATZ, *ELECTIONS AND WAR: THE ELECTORAL INCENTIVE IN THE DEMOCRATIC POLITICS OF WAR AND PEACE* (1999); PAUL K. HUTH & TODD L. ALLEE, *THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY* (2002); BRUCE BUENO DE MESQUITA & DAVID LALMAN, *WAR AND REASON: DOMESTIC AND INTERNATIONAL IMPERATIVES* (1992); William J. Dixon, *Democracy and the Peaceful Settlement of International Conflict*, 88 AM. POL. SCI. REV. 14 (1994); sources cited *infra* notes 41–42.

40. Nzelibe & Yoo, *supra* note 1, at 2528–29.

41. DAN REITER & ALAN C. STAM, *DEMOCRACIES AT WAR* 29 (2002). For a different view on democracies and war, see Michael Desch, *Democracy and Victory: Why Regime Type Hardly Matters*, 27 INT'L SECURITY 5 (2002). Even though Desch questions whether democracies enjoy any advantages in conflict, he does not support the contention that there is any disadvantage associated with democracy.

42. KENNETH A. SCHULTZ, *DEMOCRACY AND COERCIVE DIPLOMACY* 174 (2001).

mocratic success in war is not merely a function of selection of disputes, but also of securing allied support such that the larger the number of partners, the more likely a democracy will prevail.<sup>43</sup> Under Nzelibe and Yoo's logic, such further consultation and efforts to secure outside approval would be a liability, but in fact these steps strengthen the hands of democratic states. In this first scenario, then, significant advantages flow from executive efforts to seek support and even authorization for the proposed threats and actions. Unilateral presidential action may actually send a less compelling signal to opponents by suggesting that the president believes such support will not be forthcoming.

The second scenario is perhaps the one that concerns the authors: executive initiative that generates domestic opposition. One could argue that executive threats are not credible if congressional opposition prevents authorization of those threats. Approaching Congress first prevents a president from effective "bluffing"—making threats she knows are unlikely to be carried out—since congressional rejection of the proposed action reveals the bluff. Political opposition does not, however, foreclose the effectiveness of coercive diplomacy. Shultz again reports that even when democracies face dissent, their success rates are no worse than those of nondemocracies.<sup>44</sup> These findings suggest that, whether or not political opposition is mobilized, seeking support or approval for threats and action does not put democracies at a disadvantage.

The third scenario—executive action that bypasses debate—is perhaps beyond the scope of the Nzelibe and Yoo analysis, but nonetheless deserves some attention in light of recent events. In this situation, the executive takes action or makes threats outside of the public view, not bothering to wait for legislative endorsement or public scrutiny of any kind, at least in the initial phases of the conflict. In this fashion, the president may circumvent all attempts at bargaining and move to coercion and other actions. Writing in 2002, Dan Reiter and Alan Stam presciently noted the outcomes likely to result from this subversion of the constitutional order:

[W]hat happens when democrats are unable to gather popular consent, bypassing constraining checks and balances? . . . [W]hen carrying out . . . covert actions, democracies begin to act more like other kinds of states; they take violent actions against other democracies, engage in doomed foreign policy ventures,

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43. Ajin Choi, *Democratic Synergy and Victory in War, 1816–1992*, 48 INT'L STUD. Q. 663, 677–78 (2004).

44. Schultz, *supra* note 42, at 174.



and violate the human rights of their opponents in ways that democratic citizens would likely find repugnant.<sup>45</sup>

Finally, Nzelibe and Yoo draw the unwarranted conclusion that potential disputes over foreign policy should lead to a reinterpretation of constitutional provisions on checks and balances. Not only is this proposition unsupported by the success rate of democracies in conflict—the very functional criteria advanced by the authors—but it also ignores a more attractive solution: rebuilding consensus in decisionmaking and reestablishing a bipartisan foreign policy. Bipartisanship would both obviate alleged problems in signaling and strengthen the bargaining position of the United States vis-à-vis external foes. It is clear that consensus foreign policy with significant legislative involvement is not harmful but rather desirable in achieving foreign policy goals. As a polity moves farther away from consensus and checks and balances, success rates diminish and other harmful effects ensue.

From a signaling standpoint, there appears to be no disadvantage—and indeed some potential advantages—to consultation with Congress. Historical evidence adduced by Nzelibe and Yoo is at best indeterminate on the question of prior authorization, and it certainly does not provide a strong case for bypassing democratic checks and balances. Toward the end of their article, Nzelibe and Yoo suggest that such historical evidence may have little relevance today, arguing that executive primacy is necessary in a subset of conflicts involving what they refer to as “rogue states” and terrorist groups.<sup>46</sup> We address the deficiencies of this argument in the next section.

#### IV. A WHOLE NEW WORLD?

Nzelibe and Yoo make the familiar claim that we now live in different times, and the modern threat of terrorism requires new national security tools.<sup>47</sup> One of the ways in which times have allegedly changed is that signaling has lost value. Because the new enemy is unconcerned about the welfare of the civilian populations in which they are situated, traditional deterrence is ineffective.<sup>48</sup> Nor do resolve or sunk cost signaling matter as much as they once did. To the contrary, proponents of the “new threat” view argue that military action may be required earlier in

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45. REITER & STAM, *supra* note 41, at 7.

46. Nzelibe & Yoo, *supra* note 1, at 2534–35.

47. *Id.* at 2534. (“To defend itself from such an enemy, the United States might need to use force earlier and more often than was the norm during a time when nation-states generated the primary threats to American national security.”).

48. *Id.* at 2533 n.56.

the process and that deliberation may be counterproductive and even dangerous. Such logic is part of the intellectual underpinnings of the so-called “Bush Doctrine” of the preemptive use of force.<sup>49</sup>

In light of these challenges, Nzelibe and Yoo make the interesting suggestion that the United States ought to have a bifurcated approach to war powers. In potential conflicts with traditional nation-states or at least other democracies, prior congressional authorization can demonstrate resolve and hence improve the bargaining position of the executive branch. Against the new threats of rogue states and terrorist groups, however, we might be “better off retaining a system of executive initiative in war.”<sup>50</sup> Of course, such an approach assumes it is possible to distinguish clearly between the two sets of opponents—traditional states and others—as well as to group together meaningfully those within the sets, such as rogue states and terrorist groups. There is strong reason to question each of these assumptions.

Take the latter point first. The conflation of “rogue states” and terrorist groups is a longstanding theme in Bush administration rhetoric. Indeed, Professor Yoo in an earlier opinion article characterized Iraq as a “pseudo-state” alongside notorious failed states such as Somalia and pre-invasion Afghanistan, and he suggested that the Geneva Conventions need not apply in conflicts with such states.<sup>51</sup> It is unclear whether this conflation is appropriate: Iraq had a powerful state apparatus unlike anything ever seen in Afghanistan or Somalia. The problem for ordinary Iraqis was not state weakness, but state strength.

Moreover, when dealing with a terrorist group, constitutional authorization for the use of armed force may not even be necessary. War has traditionally been understood as involving nation-states. The power of Congress to declare war—enshrined in Article I, Section 8—may have little applicability to combating terrorist groups directly, at least in situations where U.S. troops are cooperating with allies on their own territory and thus do not violate the UN Charter.<sup>52</sup> Such engagements are better conceived as police actions than war.

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49. The view that “the world has changed” provides a basis for discarding past practice, but it has the effect of relying on speculation about future scenarios as justification for what must be done today. This is an odd standard for authors who argue that empirical realities should govern decisionmaking.

50. Nzelibe & Yoo, *supra* note 1, at 2536.

51. Robert J. Delahunty & John Yoo, Op-Ed, *Rewriting the Laws of War for a New Enemy*, L.A. TIMES, Feb. 1, 2005, at B11 (“[T]he Geneva Convention makes little sense when applied to a terrorist group or a pseudo-state.”).

52. The rhetorical move conceptualizing the fight against terrorist groups as a “war on terror” rather than as a series of police actions is itself the source of the blurred distinction. We doubt it has constitutional merit in the sense of triggering the Declaration of War Clause.

Nzelibe and Yoo also employ the distinction between rogue and other states, arguing that congressional authorization is not appropriate vis-à-vis the former category. But what exactly is the definition of a rogue state? If it is merely those states that do not respond to traditional state incentives and behavioral precepts, the definition is tautological: rogue states are those that require a different model of war powers. This problem is more than semantic, however, for any effective application of the Nzelibe-Yoo guidelines requires the proper identification of state types *a priori*. Without clear criteria that can be applied in advance, the risk arises that a president will use the rogue label to bypass congressional involvement for political expediency rather than by necessity.

Conventionally, rogue states have been defined as those (non-Western) states that support terrorism or pursue weapons of mass destruction,<sup>53</sup> but it is unclear that this subclass of nation-states necessarily involves unaccountable leaders who are immune to domestic political pressure, as Nzelibe and Yoo imply. All leaders are answerable to some coalition of domestic political forces on which their power and political survival rests. Failure in conflict and war helps shorten the tenure of such leaders.<sup>54</sup> Nzelibe and Yoo offer no reason to believe that the leaders of North Korea, Iran, Cuba, or other alleged rogue states are uniquely insulated from such forces.

Nor does it make sense to assume, as Nzelibe and Yoo do, that rogue states may underestimate the meaning of congressional participation.<sup>55</sup> To the contrary, many rogue states may be pursuing a rational strategy, and the appearance of irrationality itself can sometimes be thought of as rational.<sup>56</sup> Casual observation (of the type employed in the Nzelibe and Yoo paper) suggests that the “rogue states” of North Korea and Iran have recently secured gains from threatening the United States and that their strategies are far from irrational.

With respect to terrorists, Nzelibe and Yoo suggest that no bargain short of force is possible. A central part of this argument is that terrorist groups “face little or no political accountability”<sup>57</sup> for failures and can therefore afford to ignore domestic audiences. These assertions are flawed in several respects. While the image of a lone suicide bomber is a romantic one, the reality is that terrorist groups rely on various constitu-

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53. Elizabeth N. Saunders, *Setting Boundaries: Can International Society Exclude “Rogue States”?*, 8 INT’L STUD. REV. 23, 26 (2006). Of course, states defining others as rogues never include themselves or their allies in the scope of the definition.

54. BRUCE BUENO DE MESQUITA, ALASTAIR SMITH, RANDOLPH M. SIVERSON & JAMES D. MORROW, *THE LOGIC OF POLITICAL SURVIVAL* 232–36 (2003).

55. Nzelibe & Yoo, *supra* note 1, at 2532–33.

56. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 17 (2d prtg. 1963).

57. Nzelibe & Yoo, *supra* note 1, at 2533.

encies, such as financiers, religious leaders, and foot soldiers, among others.<sup>58</sup> Terrorist groups are accountable to these constituencies and may pay a price for actions that do not sustain and enhance political support from individuals and other groups. In Iraq, for example, al Qaeda abandoned the practice of beheading hostages when that strategy undermined the group's ability to attract support. In addition, a number of terrorist groups depend on host states or state sponsors for refuge or support. Such entities not only provide accountability for terrorist groups, but also introduce actors with whom the United States could bargain or pressure to restrain terrorist elements.<sup>59</sup> Under these conditions, it *is* possible to bargain with terrorist groups or rogue states, contrary to what Nzelibe and Yoo imply.

The authors also suggest—citing the example of an extreme demand by al Qaeda—that even if bargaining were possible, there may be no common ground on which to strike a deal.<sup>60</sup> We do not really know whether these types of demands are the norm. There may be instances in which the United States and terrorist groups share some common interests, perhaps even in limiting the scope of conflict. Trager and Zagorcheva argue that terrorists can be deterred where shared interests exist, and the use of force may actually have the effect of driving disparate terrorists groups together.<sup>61</sup> While Nzelibe and Yoo imply that all terrorists have irreconcilable differences with the United States, Trager and Zagorcheva contend that al Qaeda alone is in this category.<sup>62</sup> Furthermore, they argue that even if deterrence by punishment is not possible in a conflict with terrorist groups, those groups can still be influenced and are subject to deterrence through denial strategies—hardening targets so as to make terrorist actions impossible or too costly.<sup>63</sup> Thus, the choice suggested by Nzelibe and Yoo of waiting for an attack or taking preemptive action is too narrowly conceived. Both bargaining and deterrence are possible with terrorists as well as with so-called rogue states.

Additionally, Nzelibe and Yoo suggest that the advantages of executive primacy lie in its ability to bring about the actual use of force, namely preemptive strikes. Sometimes, however, terrorist groups may actually *wish* to induce U.S. military action. Use of military force by the

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58. Robert F. Trager & Dessislava P. Zagorcheva, *Deterring Terrorism: It Can Be Done*, 30 INT'L SECURITY 87, 96 (2005–06).

59. Navin A. Bapat, *State Bargaining with Transnational Terrorist Groups*, 50 INT'L STUD. Q. 213 (2006).

60. Nzelibe & Yoo, *supra* note 1, at 2534.

61. Trager & Zagorcheva, *supra* note 58, at 101.

62. *Id.* at 105–06.

63. *Id.* at 106–07.

United States, especially in ways that generate collateral damage, serves the interests of terrorist groups by raising public support for them in key areas and enhancing recruitment efforts. One might discern some tactical advantage from speed (assuming this outweighs any miscalculation from haste), but any other benefit from unilateral executive action is not readily apparent.

Nzelibe and Yoo conclude that executive flexibility is crucial. But if legislative authorization can serve a signaling function vis-à-vis democracies and not any other states,<sup>64</sup> this reduces the situations in which legislative authorization is appropriate to virtually a null set. The democratic peace literature has established that democracies do not go to war with each other.<sup>65</sup> Even when democracies confront one another in militarized disputes, such confrontations occur at very low levels (e.g., a fishing dispute between the United States and Canada), and both sides know that war is not available as a policy option. In nearly every such case, the idea that the president would even approach Congress for an authorization to use force is ludicrous.

## V. CONCLUSION

*Rational War and Constitutional Design* is a thought-provoking essay. Nzelibe and Yoo do a valuable service by introducing the vast international relations literature on war into the normative debate on war powers. For too long, legal scholars have ignored functionalist considerations in thinking about institutional design.

We have argued, however, that the normative conclusions that Nzelibe and Yoo draw do not flow from this literature in a straightforward manner. In some cases, the literature suggests alternative policy choices—such as enhancing Congress' fact-finding and evaluation abilities—that are more consistent with a traditional reading of the constitutional allocation of war powers. In other cases, the authors misread the literature to argue that executive unilateralism is superior when in fact this literature suggests no such advantage over an approach incorporating congressional input. They make implausible interpretive choices in the face of evidence that is at best ambiguous.

The ghost of the Iraq war hangs over the proposals Nzelibe and Yoo advance, as it does over much of the current debate over war powers. The conflation of rogue states with terrorist groups—and the inclusion of

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64. Nzelibe & Yoo, *supra* note 1, at 2515–16.

65. See generally BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993); see also BRUCE RUSSETT & JOHN ONEAL, *TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATIONS* (2001).

Saddam's Iraq in one or both categories—was central to the Bush administration's effort to manipulate information before the war. Hindsight has revealed this conflation to be false, yet Nzelibe and Yoo accept the administration's allegations uncritically. The arguments for the expansion of executive powers in their article—speed, necessity, and accountability—are those that have been advanced regularly by Bush administration officials. The majority of the Supreme Court rejected those arguments as legal justifications. We believe that they fail as practical justifications as well, and we fear that adopting Nzelibe and Yoo's proposals for constitutional design will lead not to better war policy, but to more irrational wars. One is enough.