



GEORGE W. BUSH ORAL HISTORY PROJECT

FINAL EDITED TRANSCRIPT

INTERVIEW WITH JOHN YOO

February 24, 2011
Charlottesville, Virginia

Participants

University of Virginia

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Riley: This is the John Yoo interview as part of the George W. Bush Oral History Project, and again, thanks for coming to Charlottesville. We talked before the tape began running about the basic ground rules, but I'll reiterate that we're talking under a veil of confidentiality and so you're the only person who is allowed to report what we talk about in here. This is to encourage you to speak candidly, not just to the people at the table but more importantly to people in the future who want to come to understand this Presidency and your experience with it as it actually was. One thing that we have to do as an administrative matter, because we've got multiple male and female voices here, is a voice identification. I'll go around the table and ask everybody to say a couple of words and identify yourself. I'm Russell Riley and I'm the chair of the Presidential Oral History Program.

Kassop: I'm Nancy Kassop. I am a professor in the department of political science at the State University of New York at New Paltz.

Nelson: Mike Nelson, I teach at Rhodes College in Memphis.

Perry: I'm Barbara Perry and I'm a senior fellow here at the Miller Center.

Yoo: And I'm John Yoo, the subject.

Riley: Subject, exactly. What I wanted to do as a way of getting started is to ask you for a little bit of autobiography. That is, to ask how you became interested in politics in the first place, and more specifically, how it is that you come by the study of the American Presidency and take an interest in Presidential powers. Sort of track us through your own intellectual history.

Yoo: I guess the earliest I can remember really being interested in this was—I have very vague childhood memories of [Richard] Nixon. I can remember Nixon resigning. I think I must have been six at the time. I remember it being on television. I remember him going up in Air Force One. That's the earliest memory I have of seeing a President on TV. But I think I really got interested in it when I went to this school called Episcopal in Philadelphia, which is a 200-some-year-old school. It was founded in 1785 and was modeled on the British public school system of education. You start Latin in seventh grade and ancient Greek in eighth grade. When you read Latin texts, you read all about politics. You do politics first and then you do poetry more in tenth and eleventh grade. So seventh and eighth grade you're reading *Julius Caesar*, things like this.

You're just reading about high politics. Even then I was more interested in not the individual of Caesar and what he liked to eat, but more the constitutional design, like why did they have two

councils and why could they veto each other. Even though we were trying to read it for the grammar and the vocabulary, I just remember learning about that.

Then I had a very rigorous Western civ [civilization] education—American history, European history, things like that. Back then it was leaders, dates, that kind of thing. It wasn't the sort of trends in American history today. I was very interested from that age. I can even remember writing my AP [Advanced Placement] history exam on [William] *Marbury v. [James] Madison*. I remember—

Riley: Does that still exist somewhere?

Yoo: I don't know. I remember, there's an AP history exam. I'm sure somebody will find it. There was this weird story in the *Harvard Crimson* about my undergraduate thesis, about why it was about Presidential power, you could see it coming, although Brian Balogh was the thesis advisor, so he probably knows better than I. But it was about—I can remember writing my AP history exam and it was an open-ended question, as they are, and I remember writing extensively about *Marbury v. Madison* and John Marshall. I guess that was tenth grade already. Even then I was interested in American history.

Perry: Do you remember what you wrote about it?

Yoo: I remember writing from a little passage we would have had in a history book. I was at home in Philadelphia last week just visiting my folks. The history book is still there on my childhood bookshelf. I could have looked and seen what it said. Then I also remember reading—

Riley: I'm going to call your mom and ask. [laughter]

Yoo: If there is a value, I'll have my mom get the edition for you and you can dig it up. Then I remember reading *The Brethren* around the eleventh grade just for fun. I got it out of the local library. To me that's not a good way to introduce the Supreme Court, but I was very taken by—*Wow, it's just like Congress*. So at a very young age I was very interested in the Supreme Court, the Constitution. The Presidency stuff didn't come around really until college, I think. I got to Harvard and majored in American history, minored in ancient history.

Around then I got very interested in foreign policy and I had two supervisors, Tom Schwartz, who is a professor at Vanderbilt now who is a historian of Cold War history. He has written books about occupation Germany, which came to be interesting in my work.

Riley: Sure.

Yoo: He has a book about LBJ [Lyndon B. Johnson] and European policy. Then Brian, on your faculty, was my thesis advisor. At least this was a trend in the '80s—The thing I was interested in, diplomatic history, was really a study back then of the Presidency. You read the books—John Lewis Gaddis's book was the great work we read at that time. The whole book is just about what Presidents thought, what they did, and all the research is Presidential archival research. Congress is just there to pay the bills, at least in this point of historiography. I got really interested in the Presidency. Harvard was when I really got interested in it. Even to the point that when I did my undergraduate thesis, which was on nuclear weapons proliferation policy in the '60s and '50s, I

went to the different Presidential libraries. I went to the [Dwight D.] Eisenhower, [John F.] Kennedy, and Johnson libraries and did research in the archives. By the time I got to law school, I was really interested in the Presidency.

Riley: At what point were you thinking about going to law school, or were you contemplating—

Yoo: When I read *The Brethren* I probably got really interested in it. Reading *The Brethren* got me really interested in the Supreme Court and the idea of clerking at the Supreme Court. When I was in 11th grade, I knew what a Supreme Court clerk was, which most people would not. But in the story of *The Brethren* they're the main actors, almost. It's clear they're the ones giving all the information to the reporter.

Also in college I got interested in journalism, so I worked on the Harvard newspaper and I learned how to write in this popular style, which I still do. I do op-eds and things.

Kassop: Were there professors at Harvard that particularly influenced you?

Yoo: Schwartz and Balogh in history. I was told that Harvard is a terrible place to go for undergraduate education because I didn't talk to a tenured professor in person until the second semester of my senior year. All the teaching was done by grad students, and Tom and Brian were untenured and everybody knew they were never going to get tenure and they would be sent off somewhere else. But the first guy I did talk to was very influential in the way I think. My senior year I decided to try to take the big names at Harvard, so I took Sam Huntington for political science and I took Harvey Mansfield. I thought I needed to get a remedial education and take the classics. Harvard doesn't have Great Books or anything, so I just said I'd better—The tenured guy I talked to in person in the last year was Daniel Bell.

It sort of gives us all pause about our own longevity in what we're doing. Daniel Bell, the great—I think he is one of the founders of the neoconservative movement, right? I'm looking through the course catalog for some kind of course and for some reason I went to look at sociology, which is not where I would look for a course normally. There was a class on American exceptionalism. It was Daniel Bell. I've never heard of this Daniel Bell guy, but I'll go.

I called him up. He answered the phone. I said, "Any space in your class?" He said, "Yes, just show up." I show up and there's only five people in the class. We sat around a table and for a whole semester just talked with Daniel Bell about why America is a different country. It was one of the bright—It was the last year he taught, the last class he taught. People had kind of forgotten who he was by the mid-'80s. It was very strange.

Also I think everyone else at the table was a sociologist, or sociology undergraduate and graduate students, and I was this kind of odd guy. I think he liked me because I would ask these very, to him, peculiar questions. But that was great. I did a lot of reading with him, books on why is America a different country. I think other things, too, like why is the Presidency in our system so different.

He thought that the Constitution is one of the really important things that makes our country different because he was not as obsessed—But the main thing he was interested in at this time

was why there had never been a socialist or communist party in the United States. There is this famous [Louis] Hartz thesis that says it is the Constitution, and Bell very much agreed with that. It reinforced my interest in the Constitution.

Perry: Did that American exceptionalism resonate with you because of your family background?

Yoo: Yes, I think so, because part of Hartz's idea was that there were all these waves of immigrants. Actually, Daniel Bell supplemented it with these books by Seymour Martin Lipset about how these groups from Europe would come here and they would be from Scandinavia and they would be socialists. It was really interesting. He showed us this map where there was this pocket of socialism in the upper Midwest and he showed that it was the same group of people from Scandinavia and the Canadian border cut across, but it was the same politics on both sides of the border. It was really fascinating, but he said the amazing thing is all these people came from all over the world where socialism, at the time, was not one of the rising ideologies. They get here and it kind of dissipates.

That was one of the things we talked about that semester. That did resonate with me personally, because my family came to the United States from Korea, which was at the time a military dictatorship, and they didn't want to live under that kind of government. As a kid they would talk about the freedoms that the United States offered and it's important to take advantage of it and take the opportunity. So I guess it did resonate. I didn't take it for that reason, because I didn't really know what the class would be like beforehand.

Riley: John, did you have exterior political interests? You're growing up in Philadelphia; were you paying attention to state and local politics at all? Were you campaigning for people?

Yoo: No, I never did any of that. I wasn't so interested in partisan politics that I ever volunteered or worked on a campaign. Some of my friends did. I do remember some odd things about growing up in politics, like Frank Rizzo was the mayor and he was the dominant—There was no other party.

I don't know anything about Rizzo. There's this famous picture of him showing up at an event in black tie with a billy club stuck in his cummerbund at a riot, because he had just come from a black-tie dinner and he'd been the chief of police, so he's ready to hit some protesters in the head and stuff. The Philadelphia of my youth was not the Ed Rendell Philadelphia; it's the Frank Rizzo Philadelphia, what I grew up in as a kid. Like *Rocky*, it was a tough town, Italian immigrants and blacks. There was a lot of ethnic politics. It was not like the tourist destination it is now. But I remember as a kid in maybe tenth grade our local Congressman spoke at the school, a guy named [Robert Lawrence] Larry Coughlin, who was a really conservative guy.

The district I live in is really one of those classic swing districts that used to be represented by a very conservative guy under [Ronald] Reagan and then it was represented by this woman who had three m's in her name—

Kassop: Marjorie Margolies-Mezvinsky.

Yoo: Right. She was the vote for the [William J.] Clinton thing and then she got run out of town. It's this town, it's this district, which is fairly affluent, but it leans, I think, liberal on social issues

but not on economic issues. It swings back and forth. I think now it actually just went Republican again, but I think before that it was Democrat. It goes back and forth. But I remember him coming to school—This is a weird thing that I think about for this guy to talk about this, but he came to school and he talked about why we might have a tactical nuclear war in Europe. It just scared the bejesus out of everybody. I guess this must have been around when the Pershing missile deployment was going on in Europe and you were seeing all these protests. Yes, it was tenth grade, would have been probably around 1982, I guess. He came and just gave a speech to these little kids about why we had to have tactical nuclear weapons because the Russians might have them. I remember that distinctly.

I didn't think he was crazy. Other kids would get up after an assembly like that and say, "He's crazy." We were just like, *Oh boy, this is something important we heard today.*

Also during the year we had chapel. I'm not Episcopalian. We all had to go to chapel and they would have speakers once or twice a week. Local politicians would come and speak. I remember Governor [Richard] Thornburgh's wife came and spoke; she gave a very good speech. I remember things like that, but that's the extent of it.

Riley: At Harvard you had mentioned the newspaper work.

Yoo: Yes, I was a columnist on a newspaper. I guess when I was in college I felt, *Gosh, I'm conservative and most other people here are liberal*, because I hadn't thought of myself that way in high school. But one thing about being on a school paper there is you're a member of the editorial board. Every week the paper runs editorials; you could write one if you wanted and people could vote. I found myself in this—I guess it's like a strange little legislature. You'd sit there and take votes and try to amend the editorial if you wanted.

That's when I started taking positions on things I had never really thought about. I just found myself, based on my intuition, voting in ways that I guess turned out to be conservative. After a year I was the house conservative at the *Harvard Crimson*, so they gave me a column and I started writing stuff. But it was things like this. One of the things I really remember in my freshman year when I was on the paper was the Harvard police were going to go on strike because they were cutting their pensions. The school paper wrote an editorial defending the police. They basically said, "Harvard is so rich, why don't you pay the police a little more?" I don't know if I wrote it up, but I remember saying, "But if we do that, my tuition is going to go up. Why should my tuition go up to do that?"

Everyone just started giving me a lot of crap for that because it was a very liberal newspaper. I think the vote was 28 to 1. No one else—I think it's right.

Riley: Sure.

Yoo: That's one of the earliest things I remember working there. By senior year I have a biweekly column or weekly column where I'm the conservative voice on the paper. But I didn't get involved with partisan politics. I never got involved with Republican Party stuff or Young Republicans or anything like that. I didn't join the conservative student paper.

Kassop: Did they try to woo you over to their paper?

Yoo: I don't know. Actually, the president of it is a professor over here at Virginia Law now, a guy named Caleb Nelson. I think he started it because his father-in-law is Irving Kristol. I was friends with him; there are all these weird networks. I was friends with him in college, but it never occurred to me to actually read it, because I didn't think anybody read—it was like the Harvard—it was *The Salient*, that was the name of it. I don't think anybody read it, so I'm not interested. But I just never got interested in being part of the conservative movement, such as it was.

Kassop: What about in law school? Who were your influences in law school?

Riley: One more question here before we leave undergraduate. You didn't take the Presidency course? [Richard] Neustadt was still there.

Yoo: I had a very unusual experience with Neustadt. I remember this. Neustadt was at the Kennedy School by then, so he wasn't teaching the Presidency course. I didn't major in political science because history was not so great, but political science was all graduate student instruction. At least in history I got to know Tom and Brian because they would teach a class and it would have 20 people. But every political science class had over a hundred people.

I went to all the intro classes to try them out. I went to [Morris P.] Fiorina's class on Congress. Neustadt did teach Presidency—I don't think they had a full-time tenured person teaching the Presidency.

Riley: Roger Porter might have been doing it.

Yoo: I think he was at the business school. It was interesting. There wasn't a chaired professor teaching the Presidency, at least when I went to look. Sophomore year is when you start figuring these things out, so I didn't end up taking it. I ended up basically doing it through the history side. I took basic survey courses in American history. The other thing is we had seminars for the department majors that are taught by graduate students and then senior year they're taught by an untenured professor. There I did a little—I wrote my papers on the Presidency when I had choice, individual Presidents and their administrations. But I didn't take the Presidency.

With Neustadt, it's really weird. My thesis was on something called the "multilateral force," which was a very obscure thing from the Kennedy administration, but it turned out that Neustadt was someone who worked on it when he was in the Kennedy administration. He had this file of classified documents. I don't know how he was allowed to take them out. He had shown them to one other guy, a guy named [John D.] Steinbruner, who wrote a book called *The Cybernetic Theory of Decision*. I don't think John Steinbruner is in academia; I think he is on the Council for Foreign Relations now or something.

I read the book pretty closely and I figured out Neustadt had this file. I went to see Neustadt and he wouldn't give it to me. I said, "Can I interview you instead?" I interviewed him for an hour, and I hate to say it, but even then I thought, *These Kennedy guys, all they're trying to do is deflect every question you ask about what really happened*. I got really irritated. Then I went to the Johnson Library—

Nelson: When you say, "These Kennedy guys" do you mean Kennedy School guys?

Yoo: Kennedy staffers. Even then I came away with the impression they're just sort of burnishing his image, because here's a guy, this is almost 30 years after. He's got this file, he has shown it to one other guy who wrote a very favorable book about what Kennedy did, and he's never going to show it to anybody ever again. He didn't know what I was going to say about it.

So then I went to the Kennedy Library. They refused to declassify or show any of these documents. That's why I agreed to participate, because I'm very much a believer in having these archival things. I think nowadays none of this gets written down anymore, so you have to do it through interviews.

I went to the Johnson Library, where I found the reverse. All they want to do—The more information, Johnson will look better, it's got to be the case. Almost every document I wanted from the Kennedy Library was open in the Johnson Library, because Johnson was Vice President so they would circulate to him. He probably never read them. He just had an assistant put them in the documents. The other great thing about the Johnson Library was I'm doing research in there and I'd walk out of the library and I'd look at the nameplate on the office and it says Walter Rostow. I'm reading these documents because Walt Rostow was the person who thought this thing up, this idea to share nuclear weapons in NATO [North Atlantic Treaty Organization].

When Rostow was working in the Eisenhower administration, I think, there's a bunch of these guys who were called "the Atlanticists." They were working on making NATO stronger. Walt Rostow was very much a part of that. Before Vietnam, this was the thing Rostow was working on. He was there just sitting at his desk. It was Daniel Bell. Nobody was paying him any mind anymore, so it was great. I would get a document, look at it, and I would go over to his office and ask him what happened. He was very generous. He was telling all these stories. He liked that I was from Harvard because he had been from Harvard. He was just talking about this story where he was stuck—He was being very introspective because he was already old at that time.

He was saying how weird it was to have come from that New England Brahmin world and he was kind of run out of academia after Vietnam. He shows up in Texas and he said, "We appeared and it's like a wasteland." He was saying, "There's nothing here." Think about Austin, Texas, in 1968. Right now there's still nothing. Have you been to that town? Flat. He said, "Back then, it was like—" It was so striking. He's from this, and his wife is from this old [Brahmin] family, highly educated, cultured, New England, and he said, "We show up and everybody is wearing cowboy boots and hats and it's just a cultural desert." It was amazing; I was just sitting there taking it in. It was great. For me it was great, an undergraduate. I wasn't into Vietnam so—I knew who he was and we'd read about him in class. We did Vietnam in history class, but I'd never thought about his individual career and how he had been an activist. Maybe that was an influence too. He was an academic and then he got involved in national security.

Another weird thing is McGeorge Bundy's son is a colleague of mine at Berkeley, teaches on the law school faculty. I talk to him about his dad every now and then. As part of this thesis, I interviewed McGeorge Bundy and I interviewed Walt Rostow. I would send letters as a kid and I would say, can I interview? I think they were happy to talk about this happier time, pre-Vietnam. It was about their views on NATO, where they really thought they had succeeded and it was a great thing. That was the other thing. I was really impressed. I could take the train to New York and McGeorge Bundy was a professor at NYU [New York University] at the time. They'd spend

an hour with me or something, Rostow. A guy named Robert Bowie, who was one of the bigger thinkers in the State Department with Eisenhower, drove to Boston so I could interview him. Things like that.

Perry: You seem to really enjoy the research.

Yoo: I did.

Perry: And the writing. So at that point did you consider getting a PhD and teaching?

Yoo: This is Brian's fault. I sat down with Brian the beginning of senior year—He probably doesn't remember this—He had taken a liking to me. So I said, "I'm thinking about what to do. Should I get a PhD in history?" He said no. I said, "Why? I think I'd do pretty well. I think I could get a PhD in history."

He said, "You'll never get a job. If you do diplomatic history and American Presidential history, when you graduate there will be maybe two jobs in the whole country and you have no control over what those might even be. It depends on when people retire, basically." He said, "If you go to law school, it's probably a lot easier to get a teaching job. If that doesn't work out, you can practice and just make a lot of money."

I had no idea how the teaching market worked, but looking back on it, I think it was pretty good advice. I think I would have been happier doing this kind of work, but I've done it through law. But some things I don't really spend a lot of time on. I don't write about George Washington and Alexander Hamilton's personal relationships, though I would really like to read all those letters and write something. But I couldn't really do that. It all has to be tied to law. But Brian, that was his advice. I didn't know any better, so I said OK. And he was youngish so he had just gone through the job market. So here's a guy at Harvard telling me not to do it. I'm sure he remembers it as much more even, sound, options, but that's not what he said at the time.

Nelson: John, if we somehow were able to read—

Yoo: I have an essay in one of your collections, don't I?

Nelson: You do.

Yoo: I think I do. That's what I wanted to make sure.

Nelson: John, if we had access to everything you had written and said up to the point at which you graduated from Harvard, would we see in any of that the seeds of what became your later scholarship on Presidential power?

Yoo: The dissertation I wrote was really about Presidential decision making, about this MLF, the Multilateral Force. It doesn't really talk about Congress. It was very much in this Gaddis approach to Cold War history, which was Presidential archival research. And really the thing that matters is what did Presidents and their administrations think the policy should be. I didn't look at Congress. To an extent, that's part of it. I'm very interested already then about Presidential formulation of foreign policy.

It's just like you read the leading books of that time. They don't care about Congress either, as far as I can tell.

Nelson: No. I guess a given in your approach to, in your growing acquaintance with, the subject, is that what the United States does in dealing with the rest of the world, however that is done, is done by the President.

Yoo: Yes.

Nelson: Also, I wonder in your contacts with Rostow, with Bundy, with others, did that make you think about working for government at a high-level function?

Yoo: Yes, that's probably when I first thought, *You could be a professor and be involved in politics*. At least for these guys—It was different, I think. Maybe I was too young and wasn't thinking about motives that people might have behind what they say. Rostow talked about—Actually Daniel Bell talked about it in class, because he had been a big consultant in the Kennedy administration, or so he said. I don't know if he really was.

Nelson: I think he was.

Yoo: He said there was this thing called the "Harvard express," which was a shuttle between Washington and Boston in the early '60s. He said, "All the Harvard professors on the shuttle, we'd say hi to each other going down to consult." There were these guys who thought it was more than just writing books; you wanted to put it into practice if you could. Again, idealistic notions. I didn't think of them as doing it just because they were power hungry.

Maybe I'm meeting them when they're older men and they're in retirement, but they didn't seem like power-hungry people to me. Later I started reading these different books, of course. McGeorge Bundy, now he seems like a powerful guy and he was a young guy who ran for president of Harvard University and he didn't have a PhD in anything. He's dean of Harvard College, he had no PhD. How did that happen? He was just a college graduate. And Rostow, he had this very famous theory about development and he thought he was developing Europe, that was at the time.

I didn't think of it as explicitly as you're saying, but I was certainly interested in it by then. Yes, I think that's fair to say. I never really thought about that directly when I was that age, but looking back, I think that's right.

Kassop: Picking up on that question, what's interesting is that you're saying what appealed to you was this idea of Presidents making policy. But was there any thought process in there at all about the fact that their authority to do that—that there was no discussion of Congress being a countermanding force. It's interesting that what seems to be of interest to you is the idea that these were people who had a chance to make a difference in the actual policies that they proposed and implemented, but did the source of that authority ever arise?

Yoo: It didn't come up. I guess in a way I learned it, and in these books, if you go back and look at them, they never talk about the constitutional stuff, right? It's all just an assumption that the Presidents are the ones who make the foreign policy and Congress just—In the descriptions it's

the question of whether Congress will pay for it or not, which is kind of what my theory is nowadays. But that's just how it appeared in the history books of the period.

It's funny; I was going back and I was reading parts of *Strategies of Containment* last year and I was just struck that Congress does not appear in the book. They don't care who the chairman of the Foreign Relations Committee is in these books. They're just obstacles, right?

Kassop: Yes.

Yoo: I always thought it was a great book. Once I got into law teaching, I started looking for books about Congress and foreign policy and they're all very weak, I think. I think it's hard for people who write these books to actually figure out what happens. I worked in the Senate too, so I definitely could see why this is the case. It might be that Presidential history is easier to do because you have these organized archives and there's a hierarchy. With the Senate, you've got to figure out why a hundred people agreed to ratify this treaty and most of them don't leave records other than prepackaged floor speeches. It might also just be easier to do that kind of work. At that time constitutional issues didn't come up; to the extent it did, there was just talk about the framing. There were courses on the framing at that time.

The other thing is I took a tutorial on the framing, so I read [Bernard] Bailyn and Gordon Wood and all those guys very closely, to the extent that when I showed up for Bailyn's class, which had like 500 people in it, I decided not to take it, because the reading list was what we'd already done in tutorial.

Riley: Who was the tutorial with?

Yoo: It was a graduate student. I haven't kept in touch with him, so I don't know if he graduated—He was a colonial history guy. We read a lot of the classic books about the 18th and 19th centuries in America.

Riley: So we get you to law school. When I talk with my undergraduates, teaching a course on the Presidency, many of them want to go to law school and I warn them you're not going to get to study separation of powers in law school; it's going to be torts and contracts—

Yoo: Exactly. That's good advice.

Riley: Was that true of your law school experience?

Yoo: Yes, yes. I get to law school and you take the same classes. Yale, first of all, is the most humanities-and-social-science law school. They're less like what you describe. But in the first semester, when all the classes are prescribed, I remember reading *Youngstown*, the only case that we read about the Presidency. Three out of the four classes are about commercial activities. There's one course on constitutional law, which is almost all about the New Deal and the Great Depression and the Supreme Court and the switch by the Supreme Court under FDR [Franklin Delano Roosevelt]'s court packing, but not about FDR and why he did the court-packing thing. It was all about why the Supreme Court changed its mind. It was like the reverse of college.

So you look at a book about constitutional law when you're in law school, about a thousand pages, there will be no more than a hundred pages on the Presidency, and most people used to skip it. There's no discussion of—For example, *Youngstown* is taught in law school as why did the Court do this? The Korean war is irrelevant to the discussion. [Harry] Truman is irrelevant. It's just, how could the Court exercise this judicial review into this kind of question for the first time. So the Presidency doesn't appear—That I find frustrating.

But then the second semester, I took a class by Harold Koh, who is now in the State Department. He's Korean. He's about 15 years older than I am. He was a role model for me. He was the best teacher at Yale at the time. He is a very engaging speaker. He's writing a book at this time about foreign affairs and the Constitution. He taught a class, which is what they all do at Yale that sort of masquerades as a class—It was really about his book. There were a hundred people in it, which is a very big class at Yale. It was just all about his book.

He talks about war powers. That's the first time I really thought about war powers as an important question. It didn't come up in college. We didn't talk about what's Congress's role when we invaded, when we went to Vietnam, for example. Just not crucial. He pitches this story of war powers, which just runs directly opposite to this view I had in college and the practice of diplomatic history as I understood it at the time, which is very Presidency focused. Koh's lectures and his book are all about how this is all a constitutional usurpation and Congress should be setting foreign policy and so on. I remember this really bothered me, so I went to Koh's office hours—

Nelson: What bothered you?

Yoo: Here in law we're talking about all foreign policy—in his view, as it has been done since FDR on—has been just taking; seizure, unconstitutional seizure of power from Congress from his view. He says Congress should decide on all wars. Congress should set all foreign policy. The President should just carry out what Congress wants.

I had just come out of college, where I had read all these books where Congress doesn't appear in any of these. I went to see him and I got into this long argument with him. When I think about it, it was very good of him to sit there and argue with a guy who just doesn't think anything he says is right. I remember saying this, and this goes to a personal story. "Harold,"—I thought that was weird, but he wanted us to call him by his first name. I said, "Harold, if you were right, then you and I would be living in a North Korean rice paddy right now, because the Korean war would not have happened. By the time Congress authorized war, North Korea would have pushed all American troops out of the peninsula."

I just remember he said something like, "Well, that's the price of obeying the Constitution" or something. I said, "That just can't be right." That's when I first—That's sort of a personal thing, my point of view, everything I learned in college. Then this legal issue of war powers, that's when it all came together. It's like spring of my first year of law school. That moment really—How could this guy rather live in a communist rice paddy as the price of what I thought was an unorthodox view of war powers?

Nelson: What I heard you talking about when you were talking about your undergraduate experiences, was that you came to understand foreign policy making as a President-centered activity. By the time you're talking to Koh, you're arguing that it should be that way. When did that—

Yoo: Yes, I guess I went to him. How could it have been unconstitutional for so long? And everybody—All these books, no one even mentions Congress. I actually thought—And policy has been rather successful in the end. The Cold War hadn't ended by then, but I was like most people who seem to agree with it, containment does seem to be it. I didn't have my own personal knowledge, just what I read in the books. I guess that's the practice and established history of the country and you would throw it all out for your theory. That's how it went from "is" to "ought to be," because I thought of him as being the one who was "ought" and I was thinking of myself as defending this is what "is." "Your theory is a radical—" and he wasn't shy about saying that he thought it would have to be a radical change in the way things work.

Most of the course was about how—I mean, he did a fair job. He would say, "This is how it is" and it is Presidentially done, but then he would say, "There's my theory and it should change to this." And when he would describe it, it just seemed completely unworkable to me. Absolutely, Congress would set foreign policy, make all these decisions, and then the President would carry them out.

Riley: How did you do in the class?

Yoo: I did well. You know, law school is really a test of speedwriting. You have three hours and people who write fast and longer tend to get better grades. But he liked me, I think. I was Korean. I was from Harvard, where he'd gone. I don't know if I reminded him of himself, but he came under very unusual circumstances. I think his dad was a diplomat to the UN [United Nations] maybe and got exiled. His family came before the quotas dropped in the '60s; his family came in the '50s. I think he didn't see any people like me until I got there because my family came in '67, so we were in that first wave. He is just starting to see these young Korean-Americans who look up to him. If I hadn't had this experience—

Riley: Is it at this juncture that you begin really digging into these questions of Presidential powers?

Yoo: Yes. I start thinking about it. Then my second year in law school I took classes with a guy named Akhil Amar, who is really into the framing on one hand, thinking about foreign policy and then the framing, and I get there and I think, *Gosh, I can do that stuff*, because the tutorial I did was far more advanced than what law professors are doing on the framing, which seemed like a terrible picking and choosing. We're always accused of it, but this is just like picking and choosing quotes. They're not even citing the right books. The tutorial was very intensive and it was really very good. When I took Akhil Amar's class, more on originalism and the framing, it occurred to me I should write more about the framing and foreign policy, two things I'm really interested in. It's a big gap, because I noticed all of the what I think of now as "pro-Congress people" in law school all make these appeals to the framing, but they didn't seem right to me. They'd have a quote from a debate and I would say, that's from just one—It doesn't seem like that's right. I read *The Federalist Papers*. I'd say that's not really what *The Federalist Papers*

were about. That's when I started, the second year, and then I started writing about originalism, writing about foreign policy.

Riley: Did you clerk between the first and second year? Was there anything—

Yoo: I worked at a law firm in Philadelphia doing commercial work. The work in the summers—Oh no, I forgot. I worked after my first year in law school. I was an intern in the White House counsel's office under President George H. W. Bush, and that's when we had the invasion of Kuwait. I even worked a little bit on that, even then, as a 22-year-old.

Riley: That strikes me as maybe something you shouldn't forget.

Yoo: You're asking me all these questions about my intellectual development. I remember it was interesting.

Kassop: That was summer break?

Yoo: This was summer of 1990, under [C.] Boyden [Gray]. Saddam [Hussein] invaded.

Nelson: August 1.

Yoo: Right, in the summer. I remember I was an intern, wasn't doing anything really important, but I remember researching control over the strategic oil reserve and when you're allowed to release the oil, how much the President could. Even then I was doing a little bit of this emergency powers—Of course he announced right away that there would be deployment, and I thought, *They're not going to ask for congressional authorization*. I just remember at the time; I wasn't writing about it, but I was there when [David] Souter was picked, so I remember that. I have this really weird anecdote. It doesn't have anything to do with this, but I remember he was stashed in the White House counsel's office to prepare for his hearings—

Riley: Souter?

Yoo: Souter. I remember by mistake walking into the office and seeing this little guy in this huge office at a little desk hand-writing stuff. I had to say hi. I said, "What are you doing?" He said, "I'm writing thank-you notes." And I said, "Really? Who are you writing thank-you notes to?" He said, "I'm writing thank-you notes to everybody who sent a letter congratulating me on my nomination."

I just thought, *This is the weirdest—I would be studying for the hearings, but handwritten thank-you notes? Thousands?* But I came to see that he had this practice. If you wrote him a letter, he would write back in response. It was really something. That was another thing I did that summer.

Nelson: Was there anything going on in the White House counsel's office that summer—maybe not, because of the time you were there—about "Will we need to go to Congress if we intend to invade?"

Yoo: I don't think so, but I was too junior to have been part of that.

Kassop: This was the summer of '90, right?

Yoo: Yes.

Kassop: The actual congressional debate didn't take place until January of '91, so it would have been after you would have left.

Yoo: Yes, but they deployed troops when I was there, because remember there was a defensive shield first.

Kassop: And then the offensive option that came in November, right before the election.

Yoo: Later I remember Desert Shield triggers the war powers clock. I have argued—No one pays attention—that's the first clear violation of the War Powers Resolution, because that's August and they don't get approval until January. That's six months, that's not 60 days. That's one thing that interested me when I finally got back to law school, and nobody cared. Nobody was saying in October there has to be a resolution voted on or they have to be withdrawn. I can't believe I'd actually forgotten.

Riley: That's what we're here for, to ask these seemingly mindless questions that may lead to something. So you get to your second year and you're digging in now on the founding and so forth. I don't know that there's anything—

Yoo: The only thing that involves foreign policy, at that time that's when you applied for clerkships for federal judges. Now it's in the third year. In between college and law school there was another little thing. I worked as an intern at the *Wall Street Journal* in Washington and met Paul Gigot, who is now the editor of the *Wall Street Journal* editorial page. I just remember getting to know him. We were joking around. It has become a very important relationship, but at that time, I was just some intern. I didn't even work for him; I was working in the news operation and he was separate. But there was a story I was working on about nominations: if the President nominates someone for office and the Senate hearing just clobbered the guy and he withdrew. Gigot was writing about it. He was asking me questions about what had happened in the hearing. Even then I was thinking about the Presidential-Senate relationship and how the Senate had sort of stage-managed the hearing to eject this guy. Nobody had thought that would happen.

Kassop: Was that the [John] Tower nomination?

Yoo: No, it was a very junior, like an Assistant Attorney General nomination, a guy you'd never—A guy was nominated for the Civil Rights Division who had 20 years earlier been caught not declaring jewels coming into the country from the Caribbean.

Riley: Well, that's—

Yoo: That would be normally a disqualifying thing. Anyway, I really liked being in Washington, D.C. That's the first time I lived there. I really liked being a *Wall Street Journal* reporter. It gave you access to anything you wanted, really. I really enjoyed being in the city. I worked for Al [Albert R., Jr.] Hunt, who had grown up a few miles from where I grew up. Al wanted me to

come back. He said, “This law school thing is silly.” He tried to get me to quit, to drop out of school, and come back and be a permanent reporter at the *Journal*. That first year I really thought hard about that, because I really enjoyed it.

The guy I shared a desk with, this guy named David Shribman—who is now the editor of the Pittsburgh paper [*Pittsburgh Post-Gazette*], but is a great congressional politics reporter who won the Pulitzer I think in the end—I was telling him about it. He basically told me not to become a journalist. I’m meeting all these people who told me not to follow their careers. He was their star reporter at the time, and I think rightly so. He said something about how journalism is too—Nowadays I think the word is “ephemeral.” That’s not the word he used, but he said, “You write something, it’s gone; no one remembers. Do something where you would think about it, write something, and it’s permanent.”

I thought really hard about dropping out of law school my first year and just becoming a *Wall Street Journal* D.C. reporter. At the end I didn’t.

Nelson: When is your conservatism becoming more explicit as opposed to being just—?

Yoo: This also happens, I think, the first year of law school. There is a group called the Federalist Society. It’s probably the most influential student group among law schools nationally, just because they’re—This weekend they’re having their main student conference here at UVA [University of Virginia] Law School. Justice [Clarence] Thomas is speaking. I’m coming back on Saturday to have lunch with Justice Thomas before he gives his speech. But there will be about 1,500 crazy-conservative law students converging here Friday and Saturday.

Most college groups at the law school level are just school-based, they’re not national. I remember getting this flyer in my mailbox, “Learn about the Federalist Society.” I had no idea what it was, but their symbol was a profile of James Madison. I thought, *All right*—I had done this framing tutorial. I knew about Madison—I’ll go see what it’s like. I really liked the programs. They were very clever. They weren’t openly conservative. They would invite conservative speakers and then arrange a liberal debater. I hope *my* classes are not like this, but I’m sure some of my college classes were like this. There’s only opportunity to hear both sides of the debate on a lot of the really important issues. For instance, abortion was taught in law school as obviously [Jane] *Roe v. [Henry B.] Wade* was right. I didn’t really have any basis to think otherwise, because I wasn’t really interested in the social issues back then, except for affirmative action.

But you know, in law school they taught *Roe v. Wade* is obviously right, affirmative action is obviously right. It was only at these meetings where they would get a speaker and a debate where you would hear both sides. I remember going to a lot of the programs. Even though the Federalist Society organizers were very up front. There were only nine of us in the whole school who were official members of this group, so it was a very small minority. They had famous judges come and speak. That’s when I started, I think, really becoming conservative. The fact that I was interested in history actually kind of made me one, because people in law school who cared about what the framers did when they designed the Constitution are pitched as conservatives, even though you may be a Democrat.

Just being interested in those questions I guess I felt I just got pigeonholed or classified as that in law school. In law school I was again seen as being an unusual conservative. I rarely spoke in class. It was just student activities where I would be thought of as being conservative. I spent more time arguing with professors in their offices than arguing in lectures.

Riley: Was there anybody else in law school that you would consider being influential?

Yoo: Yes, a fellow named Peter Schuck, who is an interesting guy because he's a Ralph Nader guy originally. He teaches accident law, now he teaches immigration. Now he's writing books with James Wilson about American citizenship and exceptionalism. But when I was there he just randomly was appointed my thesis advisor, which was a new thing they had never had before. I remember showing up in his office as a first year and saying, "You're my appointed advisor." We spent an hour trying to figure out what it was supposed to be.

He basically read me the riot act in a way. He said the dean of the law school was a guy named Guido Calabresi, who is now a Second Circuit judge. Guido is famous; he gives a speech to the first years and he says, "You are off the treadmill." At Yale it is known as the "off the treadmill" speech. His view is you worked so hard; you've gotten great grades to be here. You all deserve to be here. Stop working hard. It was really weird. You don't have to work hard, just indulge your interests. Then Schuck said that is the exact opposite of what you should do. Schuck would say you've got to work hard and get good grades because once you leave, those are all going to be important.

I only took a class with Schuck about the history of the administrative state and I wrote a paper for him about—I wish I had pursued this—He suggested I write a paper about the framers and the administrative state. Did they have agencies? What did they look like? What did they think their constitutional place was? Which is a great question.

He said, "Did they exist under the Articles of Confederation? What did they look like?" He himself was not interested in the Presidency, per se. He got me thinking again about this other aspect of the Presidency, its controlled administrative state. No one has ever written about it. I came back and I said, "No one has written about this." Brian's book is about that, in a way. That's what has come across. I remember saying to Peter, "There's no bureaucracy."

I felt like [Thomas] Jefferson and Hamilton are running the entire administrative state; they're giving orders to customs officers and letters about what they should charge. It was the most unbelievable thing. Jefferson is telling the tiniest officers all the way out in the hinterlands what his policy should be on the stupid questions. There's no staff.

I think I wrote an unsuccessful paper, because I basically told them there's no scholarship. There's a lot of original material and a student couldn't go through all that for a paper, but here's where it is and what it would look like. But that got me interested. The book I just completed, I tried to write about the administrative state under Washington. That's an important part of the Presidency that wasn't part of my original interests. I didn't care about the independent counsel statute and these domestic controversies, but working on that—and then second and third year—I wrote this in my third year with Peter, but thinking about it and working on it, I became introduced to the whole domestic aspect of the Presidency.

I feel like I learned a lot more about that in law school than the foreign affairs part. The foreign affairs I think I learned it all in college and then foreign affairs in law school is about learning these crazy theories that my professors have about it, but based on less knowledge than I had. There's just trope that in law school you say law school professors are relying on the state of science from the other disciplines as it was 20 years ago, because that's when they went to college. I was there. I think that's right because they're all talking about stuff they learned in the 1960s in college. They hadn't kept up with the literature in a way.

Riley: So you get out of law school.

Yoo: My second year I end up choosing—and this ties in with another question. You apply for clerkships. I had pretty good grades, so I applied to the D.C. Circuit, which was the second most important court in the country, and everyone at Yale is thinking about how do you get to clerk for the Supreme Court. At every top law school, that's the prize.

The most clerks on the Supreme Court come from the D.C. Circuit, so I applied. I got several offers. This is the thing—Again, this foreign policy thing came in. I picked—I mean I didn't pick, because he gave me a job offer. He would kill me if he heard me say "I picked." But I had multiple offers and I picked the judge who didn't have as many clerks go to the Supreme Court, but had been an ambassador. He became a very important mentor in my career, this guy named Laurence Silberman. He had been a Deputy Attorney General and then he became a very important foreign policy person under [Gerald] Ford, but it doesn't reflect that in his bio. It looks like he's sent out—He becomes Ambassador to Yugoslavia. It looks like he's retired out of D.C. but actually, according to him, they were grooming him, because that was actually considered—Yugoslavia, by then this is the '90s. Who would want to be posted—But in the '70s that was one of the most important Ambassadorial—Right? Because it's a communist country that is not aligned with the Soviets.

Once I got out of law school, I started working for him, and that's when I really started seeing how in Washington you could combine interest in foreign policy and law together because that's what he had done. He later on went on to very important stuff. He was the head of the [Charles] Robb-Silberman Commission on the Iraqi WMDs [weapons of mass destruction]. I talked with him a lot about foreign policy during that year I clerked with him, and we had several cases about Presidential power, because almost all the Presidential-power cases come out of the D.C. Circuit. We had two.

Oddly we had one case about the Vice Presidency and its position in the constitutional order. Then we had one case about Presidents and their ability to form special commissions to work on national problems. It was very important. I always say, and I think it's true, I learned more in that one year than I did in three years of law school.

Nelson: Did you get the sense that there was a Silberman network?

Yoo: I know people say that now, but it didn't exist then. The thing I was thinking—Until then he basically got one clerk a year on the Supreme Court. After my year, he had every clerk go to the Supreme Court. Part of it involves me—I was the one clerk who didn't get a clerkship and this really ticked him off because he felt I ought to be clerking on the Supreme Court. At that

point he decided everyone is going to clerk at the Supreme Court. So he became one of what we call the “feeder judges.” He became one of the few we called the “force-feeders.” [laughter] He force-feeds the Supreme Court with his clerks.

Before, he thought it was unseemly that they do it. It’s interesting, because I think I had a better personal relationship with him. His other two clerks were from Harvard and *Harvard Law Review* and were very cookie-cutter guys. I was very different. I was talking about things that weren’t about law and I think he was intrigued by my journalistic writing style. He thought it was really unjust that I didn’t get a clerkship when the other two guys did, so he went to some lengths to get me one. I think because of that, he decided going forward—

I think the network starts there, because the network is a combination of him, but they’re all Supreme Court clerks too, and you don’t hear about the ones from before this time who were not Supreme Court clerks. But there is this Silberman network and it becomes much more Washington—Paul Clement, who was Solicitor General under [George W.] Bush and was a clerk that year with me. All our careers come together a lot, especially under the Bush administration. And Silberman is a guy who is really part of the Washington Republican establishment in ways I thought were really interesting because he wasn’t—The typical judge would be a practicing lawyer, distinguished legal practitioner, corporate lawyer maybe. Silberman was a classic inside-the-Beltway power lawyer. I don’t think he appeared in court in the ’80s and probably the ’70s. Everything he did was government official and counseling people.

The other thing was, I would see this stream of famous people coming in to see him for lunch and coming by his office. A lot of them did have to do with law. People like Jack Kemp; he played tennis with Jack Kemp. This was really cool to me. You talked about politics with Jack Kemp. The ’80s are still important. He said, “Kemp asked me to run his Presidential campaign back in 1980.” I said, “No way.” He said Reagan was going to win. It was all really cool to me that he could be a judge and a lawyer, but actually be very much a part of these nonlegal things.

Perry: When you said you didn’t get a clerkship, that is, you applied your year after.

Yoo: And I didn’t get one.

Perry: You didn’t get it. So then he went to bat for you for that same year or the next year?

Yoo: He went to bat that year; it didn’t work out. Then I went to Berkeley and basically he got me one without applying. I guess Justice Thomas must have been talking to him. He said Thomas still had a spot open; he wasn’t happy with the applicants. Silberman said I would come and do it. I hadn’t even applied and then I got a call saying, “Is your application still good?” This is sort of funny—I was called by one of my coclerks who was there with Thomas then, and I said, “Yes, sure.”

“Well, OK, we’re going to offer you a job for the following year.” That’s a sign of how influential Silberman is. He helped Thomas do the confirmation process and he’s probably Justice [Antonin] Scalia’s best friend in the world. He is just very tied in with all these figures. He’s friends with Ken [Starr]—He’s friends with all of them.

Riley: Can I ask you a question about this? It relates to whether your sense about Silberman's own thinking about the Presidency is kind of mirroring your own. I pose the question because I don't know if you know Jim Ceaser. He's on the faculty here.

Yoo: Yes, I do.

Riley: When I was in graduate school, Jim would occasionally come to me and he would say, "Russell, what is the conservative position on the Presidency?"

Yoo: He would have to ask you?

Riley: Because I was studying the Presidency, and Jim—As you know, his interests are very broad.

Yoo: He's a conservative, isn't he?

Riley: Yes, he is.

Perry: But he was going to events and parties—

Riley: —other things.

Yoo: He's a Straussian, isn't he?

Riley: Yes, but the reason I invoke his name is it was unclear in the mid-'80s what a principled conservative position on the Presidential role was.

Yoo: I think the Reagan folks had a very defined view, because the Reagan guys went on this campaign, not just in politics but in the Supreme Court, to expand Presidential power. In law school, I do read these cases, [Jagdish Rai] *Chadha*, [Charles] *Bowsher v. [Michael] Synar*. It's only in [Alexia] *Morrison v. [Theodore] Olson* that the campaign stops. That's the Reagan view, but there's a split. There are other conservative views.

Riley: Exactly. And I think that is part of the reason why Jim would want to have these conversations, because if you look back to the period of time when he would have been training as a political scientist, the answer would have been very different.

Yoo: Right, that's sort of the Robert Taft [Jr.] view.

Riley: Exactly. So I pose the question to you: Are you at this time detecting that your thinking about the Presidency, assuming that it is then what it is now, was the prevailing notion among these Republican networks?

Yoo: Yes. I mean, the people who have this other view, which I think of as being very libertarian, conservative, they're not the ones working in the Reagan administration. They're not the ones being appointed judgeships. I think by this time when I'm in law school, it's second-term Reagan and then first-term [George H. W.] Bush and then I go to work for—This wing of the party, they're not the ones who are in positions of any authority in Washington.

Riley: So the issue had been decided by that point?

Yoo: I think so. I think even now, you talk about the Bush administration, in many ways philosophically it is a continuation of Reagan views of Presidential power. None of these guys—and I’ve always said to people—They say, “Why were you appointed to the job you were in the [George W.] Bush administration?” Why would the President appoint someone who thinks his powers are unconstitutional to represent him? I always said that Congress should appoint those people to represent Congress, but if you’re the President—The same with Clinton and [Barack] Obama. They’re not appointing anti-Presidential-power people to office, to those same jobs. It would be crazy. You would never have a lawyer who disagrees with you, right?

Riley: No.

Yoo: I know that’s out there because of the speakers. We have the federal side, like Richard Epstein; there are the famous libertarian conservatives. But they’re always seen as this voice in the wilderness, I think. They’re always outside of what really goes on and they’re mostly relegated to external criticism. In fact, if you look at the judges on the D.C. Circuit when I’m there, they’re all Reagan/Bush administration alumni. Even the ones who are very libertarian, like Doug Ginsburg, who had a fairly prominent job in Reagan, almost made the Supreme Court. He’s fairly libertarian when it comes to domestic policy, but even he believed in a strong Presidency. Because right at that time the Presidency was more important to them for deregulation. That’s how they associate it. They thought [Jimmy] Carter overregulated the economy and they thought one of the obstacles to reform was the agencies. So they viewed the Presidency as controlling—This is a theory in political science, right? This is like James MacGregor Burns—The Presidency was going to break through the ossification of the agencies and Congress.

Even the libertarians in those days thought the Presidency was the tool as vis-à-vis the other branches. And Congress is all Democrats since Eisenhower. They don’t care about—They always see Congress as the enemy. The libertarians who exist in the movement are focused on the Presidency to sweep away overregulation, and then the courts. In their own minds, I think you can have a strong President and then the courts should defend individual liberties from the government. They don’t think those ideas conflict at this time.

I’m not generating those ideas. At this point in my career, this is just stuff I’m soaking in.

Kassop: I guess the personalities during the Reagan administration who were sort of the beacons of conservatism in the legal field—

Yoo: [Edwin, III] Meese.

Kassop: Chuck Cooper and Meese and Ted Olson and Charles Fried.

Yoo: Charles is kind of excommunicated.

Kassop: Right, I know.

Yoo: Because he wrote a kiss-and-tell memoir about his time in the Reagan administration.

Kassop: *Order and Law.*

Yoo: Yes. That wasn't done. For lawyers that was sort of unprecedented.

Kassop: But Chuck Cooper was one of the beacon lights.

Yoo: Yes.

Kassop: Even at that time [Samuel] Alito and [John] Roberts [Jr.] were coming through the pipeline.

Yoo: And they become judges by then. Actually, Roberts didn't, but he did become one.

Kassop: Yes, sure, but I'm saying Roberts was working in the White House counsel's office under Reagan, and Alito was, I believe, in the Justice Department at the time. So in other words, they both kind of cut their teeth early on, and those people are now coming to senior positions.

Yoo: Yes, I guess at this time they're becoming judges or being nominated for judgeships. But I don't know that figures like Meese and Ted Olson are sort of the—because you know Meese gave these very famous speeches engaging [William J.] Brennan about originalism and Olson, because he was the defendant in *Morrison v. Olson*, and everyone thought he was a very principled guy for not plea-bargaining out and going all the way to the Supreme Court to defend those Presidential prerogatives.

Kassop: And yet Reagan—

Yoo: But actually the big hero is Scalia probably at this time, because he had been this lone dissenter in all these separation-of-powers cases. They were taught—That was the only other way you would see these views in the classroom; they would be in dissents. That's still a good thing, even though I think it was seven to one in *Morrison v. Olson*. But the dissent is so much better written than the majority. The majority is written by William Rehnquist, a conservative Chief Justice. But everyone, even in class, even though it is a liberal teacher and most of the students are liberal, we spend most of the time talking about Scalia's dissent, because it is so much more interesting than the majority. That was the other way those ideas were disseminated.

Kassop: There was a whole series of those cases, you had separation of powers—

Yoo: They were all—

Kassop: There had never really been that previously.

Yoo: No. There was a concerted campaign by the Reagan administration. They did it deliberately.

Perry: Were you a little bit disappointed that you didn't clerk for Justice Scalia, then?

Yoo: Yes. I thought he would be the one in terms of separation of powers. I became friends with him anyway. In terms of ideology, I thought at that time that he would be the one I would best be

suited to. But actually in the end I don't think so. I ended up clerking for Thomas and it was just a much better personal fit. Thomas and I just get along really well.

Perry: Can you talk about your year with him? Is that the 1994 term?

Yoo: This is going to affect how I decide on the time this gets released, because there's a big argument about what you should say about when you worked for Justices. He has claimed to me that he is going to burn his papers, which I have been arguing with him about. As someone who did historical work, I'm begging him not to burn his papers. But anyway, I'm going to talk about it. It may end up by my saying I don't want to release this until after he retires from the bench.

Riley: That's perfectly fine.

Yoo: Or actually dies.

Riley: That is perfectly OK, John.

Yoo: One thing about Thomas is, again, I think I'm kind of different than a lot of the law schools, not to say because I'm better, but I just said I went to Yale and I had been a journalist and I had these very strong nonlegal interests. I think a lot of the lawyers who come out of Harvard and Chicago are tax lawyers. They're just very businesslike. They think of the law as a science and they really struggle with the nitty-gritty of the law. Just from my background, I think about law more as a tool of politics in a way. I think of law and politics as being very closely connected. I like to argue about bigger picture stuff, which is why I was never suited to practice. I would have been a terrible practicing lawyer, I think.

But I like to argue about Congress-and-the-President stuff. I think Silberman liked that and I think Thomas really liked that, because they have a lot of time when they're not doing anything, which is something that the Senators also have a problem with. They have time they're not doing anything and they like to sit there and talk with their staff about stuff that's not work. I was very happy to sit there with Thomas and just chat about anything. It's kind of funny. Some of the things I learned in college I had interesting conversations with him about, like the settlement of Georgia by the colonists and slavery and how and why it was different than—It never came up in my work, but I took the standard American slavery course in history. I knew the patterns, the differences of slavery in the South, and all that kind of stuff.

I think he liked just personally having me around. He asked me to do all kinds of stuff that the other clerks wouldn't do. I wrote a lot of speeches for him. I wrote law review articles. We had a really good, unusual—He lives out past Fredericksburg, which is kind of far. I would drive him sometimes back and forth to work. It's an hour drive, so we would sit there and talk. Again, at that time he's not even 50. He doesn't want to spend all his time talking about things like did Justice [Sandra Day] O'Connor vote with us on this case and what do we have to change—That's what he does at the office.

So I spend a lot of time with him in a nonofficial capacity doing all kinds of things, talking about affirmative action; he's really into immigration. He hires a lot of immigrants to clerk for him. I might have been the first one, though. He was really interested. "So why did your family—" He's from Georgia and his family was there from slavery. He's the first one who left his

hometown. He'd ask, "How is it your family would just pick up and leave?" He was really interested in that. He was genuinely interested in what do your parents do and that kind of thing.

So I had this, I think, unusual relationship with him. I think now he is more like that with all the clerks. Back then it was just three years after his confirmation. He writes about this in his autobiography, I think, but he is really sort of withdrawn into a shell. He is stung by the confirmation process. He's not getting out and about. He says to the clerks afterward that that year was the year where we wrote a lot of really important opinions for him. That's the opinion where he questioned the reach of the Congress clause, which is coming up in health care.

Perry: Is that *Lopez*? [*United States v. [Alfonso, Jr.] Lopez*]

Yoo: Yes, *Lopez* is my year. *Adarand* [Constructors, Inc.] v. [Federico] *Pena*, where the Court said affirmative action problems with federal programs are unconstitutional, except later we learned except in higher education, but in all other federal programs, not. He wrote a lot of opinions really letting out his views for the first time. He says afterward that that was the term that he kind of broke out of his shell and started enjoying the job. I think I benefited from that.

I remember this moment I was driving him home. We go across, not the 14th Street bridge; I think it was called the Woodrow Wilson, which was the one that goes by the Pentagon. You go over the bridge and you keep going straight until the Beltway and then until where he lives. I guess that's 95. He says, "Turn left," so I go left. He says, "Let's go by to Mt. Vernon," so we go. He says, "Stop here." As we turn off, there's this little park that is on the way to Mt. Vernon; there is a little lake there. He says, "Let's go stand there. This is where I went right after I was nominated." This might have been the fifth anniversary of when he was nominated. It was the summer; I was just coming to the end of my clerkship and I think he was nominated at the end of July. He wouldn't do that with all the other clerks. This was a sort of unusual personal moment.

Since then we've talked about lots of things. He has very good relations with all his clerks, but sometimes he asks me to advise him on things involving his personal life. I think I'm a witness to his will, things like that. He had me come over and I think witness his estate and will instructions. That's when I said, "You're talking about destroying your papers." That's when I started arguing about it. Things like that.

Yes, it was very good personally. It was also, I'd say, more of an introduction to the kind of conservative wing of the party that you're talking about. This really grassroots movement of the conservative wing in the Republican Party. Thomas is a hero to them. That part I've been associated with, come to know as the Nixon, Ford, Reagan sort of high-politics Republican administration of policy. There are a lot of continuities, I think all the way back to Eisenhower.

There are the people who actually get them elected, and that's Thomas's world, because his wife is very much an activist in that world. Thomas would have me write speeches and say, "Why don't you come with me while I give the speech?" This is just so out of my world, this experience. I would go. I'll never forget this. He went to speak at the ground-breaking ceremony at Catholic Law School. He gives a speech and Justice Ruth Bader Ginsburg—That's her first year on the Court—she gives a speech. After the speech Thomas is just mobbed by a thousand people all trying to talk to him.

Perry: Which law school?

Yoo: Catholic, I think, Catholic in Washington, D.C.—Catholic University.

Perry: At Catholic University.

Yoo: Yes, and Justice [Ruth Bader] Ginsburg was there and she has about five people around her. I have the memory of it, how popular he was. Most Supreme Court Justices are like Justice Ginsburg. People would be afraid to talk to them; they wouldn't feel a personal connection with them. It would mostly be a few administrators who would mob him after the speech. People mobbed him; people gave him pictures to sign.

I used to talk to him about this. "I never realized that you were this symbol in partisan politics or political movements," in a way I don't think any Justice had been before. So writing the speeches and traveling around with him—

Perry: What did you write on for him?

Yoo: All kinds of speeches. Since he is a Justice, he can't speak about what he's doing. It's hard for him to speak about law. Given what was going on, he gave a speech about the need for civility in public discourse, because he had been attacked so much. He thought, *I want to write about how the decline in civility is ruining our politics*. So he wrote about civility. I did a historical essay for him about the [Homer Adolph] *Plessy v. [John] Ferguson* case, which was a lot of fun because I got to do real history again.

He gave a speech and published an article for the Supreme Court Historical Society about the *Plessy v. Ferguson* case, which was obviously of great interest to him. He wanted to show how black views and black society had very mixed views about segregation, so he had me trace where all the people in the case came from, what their histories were. I found these interesting things—I'd have to go back and look—like the Justice who wrote the famous dissent that we have a color-blind Constitution was a soldier in the Civil War.

Perry: Justice [John] Harlan.

Yoo: Yes, Harlan. I think he ended up fighting in a battle with the lawyer who represented *Plessy*, because I traced back their biographies and their battle histories. It was just those kinds of things I was doing. I really enjoyed that. He wasn't writing about law; he was speaking about some nonlegal things. He said, "I can't talk about *Plessy v. Ferguson* and its Presidential value," because his personal view is that *Plessy* is a good example of why he doesn't follow *stare decisis* because, he said, "If I were a judge for the period after *Plessy*, I would not have followed *Plessy*, so I don't think I have to follow any precedent. I should do what's right. I should read the Constitution and give my best answer. I'm not going to be one of those judges between *Plessy* and [Henry] *Brown* and follow segregation." That's why he has this unusual view for a Justice that precedent doesn't, shouldn't, bind him.

Because of that, he can't write about that in his nonjudicial capacity. He had to write about interesting things, which aren't law, like where did the lawyers come from and who was *Plessy*. You don't think about it. Who was *Plessy* and why was he complaining? What did they actually

do to him? It was really interesting. Plessy was only one-eighth black. He was what they called octoroon. Thomas always impressed me that even within the black community, white views about race had so become part of black thinking, which was quite terrible, that even blacks treat each other differently based on how dark or light their skin was. He was showing how Plessy in a way was complaining about how he should be treated better than other blacks. It was just very interesting, digging through and doing things like that. There are other speeches like that. I can't remember all of them.

Riley: Hold on to where we are right now, because humaneness dictates that I call a break for three, four, five minutes.

Yoo: It didn't occur to me, but I guess there's stuff that I've done that would be interesting to historians—everything I get interviewed about is obviously about interrogation.

Nelson: We should charge you for this. *[laughter]*

[BREAK]

Riley: A follow-up question about Thomas?

Nelson: At this point have you met any of the people or gotten to know any of the people who you're going to end up working with in the George W. Bush White House?

Yoo: I know [John] Ashcroft. I don't really meet [Larry] Thompson, not while I'm clerking. [Michael] Chertoff I meet the year after. Most of these people are more—Ted Olson I get to know fairly well in this time. I didn't know him in law school. I get to meet him through Silberman, but he is also very close friends with Barbara Olson, who is Ted's wife and by then is not yet a legal commentator person. She is a practicing attorney in the House.

So I start to meet people. I was friends with Justice Scalia around that time because he is friends with Silberman. He would come by the office. Then when I clerked, I ended up playing tennis and squash with Scalia all the time. It's very strange. I'm not boasting; I just think I'm different because I'm not that interested in the exact citation of precedents and everything. Like Scalia, I think Silberman and Thomas just take a liking to me. They have me do stuff with them that is sort of unusual. Rather than asking his own clerks to play tennis or squash with him, Scalia wants to play tennis and squash with me every week. Why would you do that? Why don't you just do it with your own clerks? I think I would just sit there—My wife says it's that I don't treat more important people any differently than I treat regular people. If I thought Scalia was cheating on a point I said, "You were just cheating, that was out." I'd say that to him.

Riley: "Now tell the truth."

Yoo: Yes. My wife says this is an odd aspect of my personality, that even though in my work I think hierarchy is very important, in my personal relations she is always struck, even though I

know that person is really important or whatever, she says, “You just don’t treat them any differently. You don’t seem to be nervous or afraid around important people.” I think that’s true. I think maybe that’s why—Even Rehnquist asked me to play tennis with him. Rehnquist is famous because his clerks all have to play tennis because he wants to have a doubles game every week. He has three clerks. When he hires them, they all play tennis. One of them broke his leg, so he asked me to be the fourth tennis player while he was recovering.

I’m not the best tennis player, but even with Rehnquist—I had an old BMW at that time. It turned out he had a BMW, one of the really early ones. We’d always sit there and talk, and this is the kind of thing, “Chief, you must have been really entertaining driving a rear-wheel BMW in Wisconsin in the winter.” He’d laugh. I think that a lot of the other clerks, when they deal with Justices and judges—Actually it does have something to do with Yale. Since I thought law is a lot about politics, I thought of them probably more as politicians.

I think when you’re a Harvard lawyer or Chicago lawyer, you think they’re like gods. “Speak what the law is,” right? If you’re like that, you treat them really differently. I just noticed this. The guys who come from those law schools are very deferential around judges. At Yale, we didn’t think appellate judges were divining the truth; we thought of them more as making policy. I guess when you think about them that way, you don’t think of them as superhuman figures, so I wouldn’t be very deferential to judges. I think they liked having that because they’re 50, 60 years old. I think they’re probably sick of having all these 20-year-old people speaking softly around them all the time.

I think I got to know a lot of these figures just because of that. So yes, I spent a lot of time with Scalia and I spent a lot of time with other Justices of other chambers because of that.

Perry: Did anything happen in that year, even aside from cases? Because I printed out the cases from that year and I don’t see any important Presidency cases as such.

Yoo: Yes, there were no Presidency cases as far as I remember.

Perry: They’re not, but do you end up talking about that, or is there any impact on your view of the Presidency during that year in conversations?

Yoo: The big thing that happens that year is that the Republicans take over the Congress. I definitely think I saw the Court become more conservative while that happened. I think they saw when Congress is no longer going to be a critic of any conservative thing they did, like *Lopez*, I could—Actually, in chambers I argued in favor of upholding the federal law. I said, “It’s been 65 years of the Commerce Clause. This is like a nothing case. How could you overrule all that precedent?” That’s when I started arguing with Justice Thomas about his views on *stare decisis*, and then he is learning about why *Plessy*, why he thinks those things.

I was the only one in our chambers who said we should stick with established Commerce Clause treatments, but that case I think it would not have been decided the way it was if the Democrats had stayed in power, because they would have had so much abuse heaped on them. Instead they got praised for it, and the Congress starts talking about it as a great decision. It just seemed the interaction between the Supreme Court and Congress, because of the ’94 election, sort of reinforces my interest.

Riley: Did it reinforce your position? I guess the question that I would want to raise about this year and tracking forward is do you have any doubts whatsoever about the positions you're staking on Presidential power as a result of Bill Clinton being in the White House?

Yoo: Let me tell you, let me go back. I spent my first year teaching—between college and law school, so when we start really sitting down working on Presidential power, it actually starts in that year in between. Even though during the year I clerked there were no Presidential power cases of importance, it was all federalism and social issues, affirmative action is a big—There are three big race cases. There are a number of religion cases, but nothing about the separation of powers that I was really interested in. But in the year in between, John Hart Ely comes out with his book *War and Responsibility*. I started writing a book review of it and I started checking—

Riley: For?

Yoo: *California Law Review*, the law review in my law school. He makes some absolute claims as to what the framers thought. Again at this point that doesn't sound quite right with my memory of how we went through the framing. We went through the Gordon Wood book, and Wood said there's a return of Executive power in the Constitution. It's a Thermidorian Reaction. There's a standard Wood thesis, that the Constitution is limiting democracy in various ways. This claim that the framers of the Constitution were expanding congressional power and all these arguments—That is not, at an abstract level, what happened, as I understood it.

When I read these quotes that he uses in his book—It's a book review; I would go back and check them and say, "Where did this quote come from?" I just remember having this moment. One of the very first quotes he uses is Jefferson's quote about how we should clog up the process for war. Immediately I'm like—? Because I know Jefferson is not at the Constitutional Convention. He's not in the country during the ratification. This quote is after the Constitution. It's a sort of persnickety historic—The use of this quote may be true to the era's feelings, but it is inappropriate in claiming—So I started going through all the quotes he used and started asking where did they come from.

Some of them are from 1812. That gets me into this—I don't want to write a book review saying Ely is a bad historian or manipulating history, so at that point I said maybe I'm going to write an article. That's the genesis of the first big piece I did, which was the original understanding of war powers. But it started as something prompted by John Hart Ely's very slim volume. So I write that. I spend the whole year, my first year of teaching, working on that article.

Riley: And that year John, forgive me, was?

Yoo: It was 1993 to 1994. Then in the middle of that year, that's when Thomas's chambers called and said, "Why don't you come work for us?" I have to put that article on hold because I'm not allowed to publish it while I'm in government service. I could have published it; it would have come out in '94 originally, not that that really matters that much now. But I'm thinking about this stuff and working on it in my private time during my year at the Court. One of things I talk about with Thomas, one of the interesting things about clerking with him at this time, is he hasn't decided most questions yet.

Like if he had been mostly a participant in the fight over race. He didn't know what he thought about Presidential power and separation of powers, but federalism—I remember that. He would run the chambers this way. Almost all of the Justices write memos about the case and send them to the Justice, and Thomas is different. He has all four clerks sit together with him and just argue about what the right outcome of the case is. There's no memo, really. He has a memo that describes the context of the case, so that everybody else knows what the case is about, but he doesn't have a memo that says you should do this, you should do that, kind of thing.

I remember with the Commerce Clause case, *Lopez*, he had never thought about it before. It would never have come up. We had a really long argument about the Commerce Clause and origins. It was really great, one of the great things about clerking with him. One thing I remember saying to him about it was, "That's the great thing about clerking for you in person. You think about this stuff for the first time." If you clerk for Brennan after 40 years, you're just applying what Brennan said before to this case. With Thomas, I felt like here is a Justice who has these instincts or intuitions, but he has never had a view on the Commerce Clause, so we're— And the funny thing was, I was the one who was saying don't overturn 60 years of precedent. My coclerks were saying, "But the framers think what the Commerce Clause means—"

I said, "Yes. I acknowledge, read *The Federalist Papers*. It says manufacturing and agriculture are not under the Commerce Clause, but this is part of the political settlement. We can't reopen it." I lost. It was never even in doubt, actually, but I think Thomas liked seeing me try. One thing about that term that is of interest is work on law stuff that involves original understanding of questions. That's the main way I think it advances my thinking. I do constitutional law so I have to know all these other areas. But it doesn't really advance my academics, my writing. I do write about federalism too, but in terms of war powers stuff, it doesn't really get me anywhere.

Riley: Let me come back to the question I posed, and that is, are you in any way seriously rethinking your understandings about Presidential power based on the realities on the ground in the 1990s, particularly after 1994, when you've got a Republican Congress, which presumably, on policy issues, is acting more consistently with your own personal positions and with respect to Bill Clinton?

Yoo: Not when I'm clerking, but after my clerking year I went to work in the Senate, and that is when I really start seeing things, because the Supreme Court doesn't really interact that much with the President, at least not until this last decade.

Riley: Right.

Yoo: This issue of the scope of Presidential power doesn't really come up so much in the clerking year. It did come up clerking in the D.C. Circuit, but I can't really think of it coming up at all—

Riley: How did you end up on the Hill then?

Yoo: It was just a totally personal thing. My girlfriend at the time, who is now my wife, was a journalist. She had gotten a position working for the Knight-Ridder chain in the Washington bureau, so I wanted to stay another year. I was prepared to go back to California, but she didn't want to go back. She had never been there, so she didn't want to go at all. I said, "OK, I'll stay

another year.” I was genuinely excited about the idea of Congress changing hands and I thought that would be interesting to work there. It was an example of Thomas taking personal interest in me. He called Senator [Orrin] Hatch on the phone repeatedly and basically got me that job. I wouldn’t have gotten it through any normal process.

Riley: Sure.

Yoo: I always feel that working in the Senate I learned more than I ever learned in graduate school. I read books about the Congress by scholars and I read what’s written about Congress. I just don’t think you could teach how it works in class. You have to go do it.

For an example, when I got there I was watching the Senate, how it worked, and I talked to the guy who was the chief staff guy of the committee. I said, “I still don’t understand why some proposals go through and some don’t. There’s a hundred Senators; they’re all equal. They can all stop anything. You have rules that work in various ways, but it still doesn’t explain why one Senator has more power here than any other. Seniority is dominant on the committee, but when it comes down to the floor—” “It’s like high school,” he said. “The more attractive, popular kid wins. It’s not in the books; you can’t learn it, but why does anyone follow [John] McCain in the ’90s versus this other guy? It’s because people like him more. There’s only so much about self-interest that explains why people vote certain ways and so on. A lot of Senators defer to each other on things. It has a lot to do with just personal popularity.”

I think that there’s a lot of truth to that, but you have to be in it and see it to understand it. That’s really why I went there. But again, I was very fortunate, I know, working for Hatch. I had a very interesting relationship with him because I was only going to do it for one year and go back to teaching. I knew I was going back, and he knew I was going back. I had a different relationship with him because he knew I wasn’t beholden to him for a job or my future. He knew I didn’t want anything from him. I didn’t want to be a judge. I didn’t want him to appoint me to anything.

It was really funny, an unusual relationship. He’s an unusual guy. But again it was like the other two people I worked for. I did a lot of weird personal stuff with him that’s not part of the job description, just for fun. For example, the year after I left he asked me to look at the way his office was organized and redesign it so that it made more managerial sense, like he couldn’t ask someone on his own staff to do that.

Riley: Sure.

Yoo: Again, he didn’t want to ask anyone who might leak it, so he asked me to do it. I was just working for him for a year. I flew back, I read all these books about management, which I didn’t know anything about, and drew a flowchart of his office. Then I did what it ought to look like and I showed him that his was this octopus. I said a corporation would be organized with this, and I just showed him the two pictures. Then he brought the chief and said, “Make it look like this.” Because the Senators have so many personal obligations, their staff becomes just an aggregation of personal ties.

Riley: Of course.

Yoo: He had all these people on staff who didn't do anything but were people who had done something 10 years ago for him or people he liked, these kinds of things. But anyway, that's kind of the relationship I had with him, because I was in this odd position. I think he felt like he could say stuff to me or talk about stuff that he couldn't talk about with regular staff. That was a lot of fun.

Seeing how the Judiciary Committee worked, and it worked on judicial nominations, which was really—

Kassop: That's what I was going to say, '95, '96 was when a lot of the Clinton nominations were just stopped and there was no movement. It was very controversial.

Yoo: Yes. I had a big part to play in that. The Court was becoming more conservative, but part of it was I really was a believer in this Jeffersonian departmental theory. I think the Senate is entitled to push its powers as far as they go and get independent judgment of the Constitution, and the President does too. I really thought "advice and consent" meant that the Senate was entitled to ask hard questions. What we started doing was asking Senators on our side, including Chairman Hatch, to ask substantive questions at hearings.

Some of the Clinton guys who didn't make it were really bad nominees. A lot of them were picked for campaign payoffs or did weird things. I always remember there was this one guy named Bud [Charles R.] Stack who was nominated out of Florida. He raised about a million dollars for Clinton in Florida. He was a courtroom trial lawyer, not the kind of guy who would be appointed to an appeals court. I was prepping Senator [Jon] Kyl, who I also became pretty close to because of this. Kyl was friends with Thomas. Kyl had come in to see Thomas when he got elected to the Senate and I happened to be able—I met a lot of people because of Thomas. J. C. [Julius Caesar] Watts came in.

So Thomas would say—because of my relationship, I would be the guy—"John, come in here and take them on a tour of the Court." He would always see them and then I would take them around the Court and show them the basketball court over the courtroom, the "highest court in the land" we call it, the cafeteria, and all the famous rooms.

I got to meet my childhood Philadelphia hero, Charles Barkley, the basketball player, because he came to visit. I got to give him a tour. I mean, as a kid, I was—that was better for me than anybody else I gave a tour for. Barkley and I talked about constitutional law. It was an amazing thing.

Nelson: He was thinking about Governor of Alabama.

Yoo: Yes, he was thinking about running for Governor in that year.

Riley: As a native, I will tell you how close that came.

Yoo: I assume not close, but he said, "I'd like to talk to you." We're there and he said, "What about the death penalty?" I said, "What about the death penalty?" He said, "Why is the death penalty so screwed up?"

So I started explaining how there is this complicated case on the death penalty and you have to balance mitigating versus aggravating, blah, blah, blah. He goes “No, I’m not interested in that. Why doesn’t every murder in the country get the death penalty?” That was his question. “Well, there’s law and there’s history, and—” blah, blah, blah. That was great.

I met Senator Kyl that way because Kyl—I don’t know why. He came over to introduce himself to Thomas when he won the Senate seat. I met him coming out of the office and talked to him for a little while, so he remembered me when I showed up. When he was in charge of the hearing for this guy Stack, he had me come in. He remembered me. It’s unusual for a Senator to have a staffer of another Senator come in and brief them, but he had me do it.

I was friends with his counsel, who was there too, so he wasn’t offended in any way. I just said, “Here’s the guy’s background.” Kyl was a distinguished lawyer before he was a politician. He was Arizona’s top water law lawyer and I think had won four cases in the Supreme Court. He doesn’t boast about being the best lawyer in the Senate, but I think he is the best practicing lawyer in the Senate, at least at the Supreme Court level. So I described it. He was just like, “How could they put a guy like this on the appeals court?” I said, “OK, let’s ask him some questions we would ask a first-year law student. Let’s have some fun.” I actually inserted questions—

They usually ask questions like, “Will you uphold the Constitution?” And they say yes. “Will you follow the Supreme Court?” They say yes, and I said, “OK, instead let’s ask him, ‘What do you think of *Lopez*?’” I put in these cases, from just two months ago. I said, “Ask him about *Lopez*, ask him about *Adarand*, and see what he says.” I’ll never forget this. The guy says, “Never heard of it.” I’m sitting behind Kyl—“Tell him what the case said and then ask him.” So he said, This is a case where the Supreme Court just held for the first time, blah, blah, blah is unconstitutional. The guy says, “I don’t really know. I don’t really remember cases by their case names anyway. I’m not really sure what I think.”

Kyl says, “You don’t know what you think about a Supreme Court case?” He goes, “Constitutional law is not my thing.” Kyl is amazed. I’m not feeding him questions anymore; he’s just amazed. “Constitutional law is not your thing?” He said, “Well, what’s going to happen—? All you do is decide constitutional—What are you going to do when you get a constitutional case?” He said, “I’ll just walk down the hall and ask my colleague next door what I should do.” So he was gone. We didn’t do anything. The Clinton people withdrew him.

In a way we did that again and again, so there was this quality filtering effort. A number of nominees just dropped or got pushed out because of that or got stalled. The Republicans did it too. The Republicans nominated people for campaign contributions and different things they’d done for the party, but I think unless they were going to have a big fight, there hadn’t been this routine questioning of their qualifications, so that’s one thing.

It was a campaign year; [Robert] Dole was running. One thing we also did, which was a thing I thought of, was—We also never do this—let’s see what the judges we confirmed under Clinton have been doing in their two years on the bench. I started reading the circuit court opinions of different people. I started having Hatch do speeches, and he wrote a number of op-eds saying,

“Hey, we confirmed this guy and he just argued that prisoners have the First Amendment free speech right to put naked women pictures in their prison cells.” Just found all these cases.

I don’t know why, maybe it shows why Dole didn’t get elected, but he decided to make that his initial campaign issue. The first speech he gave after he announced he was running he made about judges, because I think it appeals to the conservative base and social conservatives. He basically used all our stuff. Once that happened, Hatch says run with this issue, do as much as you can find, and all this kind of thing. We made up a judicial hall of shame with the top 10 worst opinions by Clinton judges and what they said.

I think certainly at that time we did make judges more of a political issue. I think as the politics of it, they didn’t have a lot of avenues of attack on Clinton, actually. The economy was starting to do really well, so they couldn’t say the economy would be better. National security was relatively quiet. I guess the campaign people on the Republican side said judges and social issues are really going to be the wedge issues. We built this record that became useful in the campaign. I would say it was never our intention to stop all these judges or actually slow them, except for the ones like Bud Stack. But once it got tied up in the ’96 election, then if Dole believes what he’s saying, how can he confirm any of these guys? So in ’96—I was there in ’95 and ’96; I left halfway through ’96. I think that’s what happened, because Dole controls the floor.

Hatch was sending a lot of these guys to the floor for votes and then Dole decided not to give any of them a vote, which makes sense, basically, in terms of his campaign position.

Kassop: But also that’s quite typical of the last year leading up to a Presidential election or reelection. Judicial nominations just stall because there’s always this possibility that somebody else could be President after the next year and they’re just holding on.

Yoo: Then it becomes permanently slowed.

Kassop: And it did, even in ’96 and ’97.

Yoo: I think under Bush, too, the Senate decided at some point it was just going to slow down all confirmations for appeals court judges permanently.

Nelson: I have a naïve-sounding question that I think will tee you up for a sophisticated answer. The naïve question is this: Wouldn’t someone who is famous for his expansive view of Presidential authority in areas of war and peace, wouldn’t you expect that kind of thinking to be accompanied by a view that a President is entitled to great deference in judicial appointments, nominations, et cetera?

Yoo: I actually never thought that. I think a lot of this has to do with your view on constitutional interpretation. Going back I guess to law school and talking about *Marbury* and its roots, I come away—I eventually wrote an article saying this—I came away with the view that I think was more what we were taught in history class, that *Marbury* was the first articulation of judicial review, but the Supreme Court was actually a very weak institution at the time, didn’t strike down another federal law until *Dred Scott*. Its claim of judicial review—and this I think is more studying with Akhil Amar—was an authority that the other branches had too. They all have to

interpret the Constitution in doing their duties and they have equal rights to—so this is sort of the Jeffersonian and [Andrew] Jacksonian view of judicial review.

I thought that was right. So when I get to the Senate, I think the Presidency has its right to argue for itself and press its powers, but it is up to the other branches then, in my view, to press their powers as far as they will go, too. I didn't think the Senate ought to defer to the Congress any more than the President should defer to Congress on its views also, or the Court defer to either of them. I realize that is more chaotic and also more political. I think that actually leads to more space for political solutions rather than you have to defer to the President or you have to defer to the Senate. But that does cause me to think in ways that are not part of conservative legal high theology. Conservative Republicans definitely thought the Senate had to defer to the President's choice, because that was the argument made for all their nominees, especially [Robert] Bork. Because they hadn't held Congress in so long, they really didn't like the idea that Congress should have its own right, its own judgment on things. I had never had that view that the other branches have to defer to each other.

Riley: Let me ask you a corollary question to this and that is, on balance, having had the experience in the legislative branch, did you feel that you left that experience with a heightened respect—"respect" is not exactly the right word—but with a higher degree of appreciation for the role of the national legislature in the constitutional constellation, or with a diminished sense of—

Yoo: Yes, I guess in two ways. One is, at the level of formal constitutional law, I really came away with the view that the funding power can allow you to do anything you want, because we did use it to do anything we wanted when I was in the Senate. If we wanted to do anything, we'd just stick it on an appropriations rider. I just saw even the threat of one would get an agency to usually do what you wanted.

I came away thinking that the funding powers were really pooh-poohed by constitutional law scholars. They don't think much of it, but I think that's because they don't study it in operation. It doesn't appear in cases. But to me, having seen it in operation, it's like this is the *most* important power Congress has against the Presidency, and it usually gets its way. Presidents aren't in the business of defying appropriation riders. Nixon made some claims, but Reagan never tried. They just—Maybe the [Edward P.] Boland amendment. And look at all the trouble it got him into when he tried to ignore a funding rider. One was that.

The second thing, and this I guess goes to Michael's question, is I also saw how much all these disputes get resolved by politics. One thing I came away thinking is a lot of these things that law professors are writing about, they pitch as separation of power/conflicts of constitutional principle, but it ignores the actual political relationship and how important it is who is doing well and who is doing poorly in politics. The solution is going to get reached in many ways, in my view, regardless of the constitutional question and how it gets resolved ultimately. There are a lot of areas for settlement between the two branches, just because I've seen that a lot.

So with the judges for example, the President gets the nominee and the Senate's role is—even though of course the Senate, I thought, could have its own judgment, it is *ex post* the nomination. The Senate doesn't get to pick. Yet at the same time, I saw Clinton asking Senator Hatch who he could appoint to the Supreme Court, who could get confirmed, and that narrowing President

Clinton's choice. Clinton didn't want to appoint [Stephen] Breyer or [Ruth Bader] Ginsburg. He actually personally disliked both of them, especially Breyer. He really hated Breyer, and still he picked Breyer, because Hatch said, "If you nominate Breyer, I will get him confirmed." That was the easy—Hatch didn't pick Breyer, but he narrowed the options. That is completely contrary to the constitutional scheme, right?

I saw that in lots of areas; in the war powers area, that got me thinking. A lot of these war powers questions could be and probably are the result of political interactions. We're trying to elevate them to how we as lawyers think about constitutional laws and clash of principles, and the Court defines a line, and politics is so messy for us because the line is always moving and it depends on circumstances. But it comes to influence how I thought about war powers in particular.

In a weird way, I get more respect for the Senate as a political institution. I guess I don't think so much about its constitutional authority, because I don't think they're as important as we in the law schools think they are.

Perry: You said when you went to work for Senator Hatch that you didn't want anything from him and you said almost as an aside here that you didn't want to be a judge. How did you know that already at such an early stage in your career?

Yoo: I'll say I was offered a judgeship under Bush and I turned it down. I was offered to be a judge on the Ninth Circuit in California. My parents would have loved that. They always thought I should be on the Supreme Court. That's something I decided, I don't know when, at what precise point, but if you wanted to be on the Supreme Court, you just do things a different way than I've done them, certainly. Like with Roberts, you just never write about anything, you never give speeches. You avoid taking a stand on any controversial subject, and I thought that was inconsistent with being a professor. I have colleagues who are professors who actually do this. They do want to be on the Supreme Court and I know they have very strong views they will never write or speak of. They write articles about administrative law or whether the district court or the circuit court has authority to decide some fact, to me really boring stuff.

I just thought that's what you do, that's the job you have, and I thought it would be really weird to act in a certain way because you thought you had this one-in-a-hundred-thousand chance of being on the Supreme Court. Leading your whole life around it seemed really—But I know lots of people who do that. One thing is I thought I didn't want to do that. Another thing is I clerked for these guys, Silberman and Thomas, whom I thought—One good thing about clerking with them is for them being a judge was not the be-all and end-all of their careers. They kind of fell into it.

Silberman didn't want to be a judge; he wanted to be Director of the CIA [Central Intelligence Agency]. He said that was the job. He said Reagan offered him any Cabinet job in the Reagan administration except for the "big four" and Director of the CIA. He said he didn't want to be any of those other ones. They said, "What if we put you on the D.C. Circuit, and maybe you'll be on the Supreme Court?" So he did that. But that was not his choice.

I clerked for a guy who was also—The judge role didn't fit what he was. Thomas too, despite what people say about him, didn't lead his career up to his nomination to be on the Supreme

Court. The last thing you should do if you want to be on the Supreme Court is be head of an agency that has jurisdiction over race issues; that's like the worst thing you could do. So again, he's a guy who also I foresaw had a lot of interests. Scalia is the model of the other kind of judge. To be a Supreme Court Justice is what he's always wanted to be. If you look at the way he led his career, he never wrote or said anything controversial before he was put on the Court.

He wrote about administrative law. He wrote about standing doctrine, and that was his most important work. He barely wrote anything. I actually don't know how he got tenure, because he only wrote about three articles his whole career before he became a judge. He has become much more important as a judge than he ever was before because he wanted to make sure he could get confirmed. I thought being a professor would be a miserable life if you were self-censoring yourself this way. I saw people who the Clinton people were nominating who had led that kind of life. I was thinking, *Is it really worth it?*

Perry: But it also sounds like you were beginning to relish even more the politics. You said as a teenager and in high school you didn't participate in politics.

Yoo: Yes.

Perry: But it seems like you relished it in that one year.

Yoo: That's true. Working in the Senate is the first time I became involved in partisan politics, and I did like politics. I hadn't done it really except in the narrow range of law: law schools and legal teaching. Working in the Senate—That's the other thing. The Senate was so different from law in a way because you could do anything. Everything is open. You don't have to follow any precedents. It's the legislature's will. It's really interesting work and I really did like it because it was so unstructured and it was—Because the judiciary, and I would later learn the executive branch, is very formal and process based and that Congress really isn't process based in the same way and it isn't really hierarchical. The House is more so, but the Senate is not.

I really enjoyed a lot about the politics of it and learning about why things worked the way they did. Also the strange thing is that the staff have a bigger influence in the Senate. You draft opinions for Justices, but Senators rely on their staff a lot more, I think, than the other branches. That's kind of a thrill. You give a piece of paper to a Senator on the phone and he will just read it right there, without changing it, because—They say they're "an inch deep and a mile wide." They have to take positions on so many things. It's not the same with a Justice. You draft an opinion, they change it, it goes back and forth. Senators never edit anything.

The staff really run the process of the Senate in a way that they don't in the other branches. I did enjoy it, also because it was so new. Like I said, I read the articles on political science about Congress and how it worked and it was completely different; it really was. I don't think people are sitting there drawing out that little spectrum of preferences and spatially mapping where they all line out and who is the median voter. They don't think that way. I really liked seeing how it worked in real life; I really enjoyed it. I always say I enjoyed it much more than any other job I had. It was a lot of fun.

Nelson: An article that you drafted I guess during your first year at Berkeley, that's the article in which you interpret the word "declare" as meaning "acknowledge the existence of" rather than

“decide to.” You must have known when you were writing that that this was going to be a shot across the bow of the existing scholarly wisdom on the subject.

Yoo: Oh yes. But it’s like a scholar in law. When I see that much consensus about something, I think, *This can’t possibly be right*. If everyone agrees on this, there has got to be some other story there, because in law there’s always argument about something. When I saw that much consensus, I thought there’s got to be—It started off with looking at Ely’s quotes, but then I started looking—I think the most amazing thing I found, which no one ever cares about, is that there is that other clause in the Constitution that talks about engaging in war—

Nelson: Levying war.

Yoo: No one had ever written about that. All I did was read the Constitution and I tried to find every time it mentioned war.

Nelson: You must have been itching to get that—

Yoo: You know, it’s interesting, no one—I’d even raise it in debates. Everyone ignores it. I raise it in debate, people just don’t respond to that point. It’s in the same document and it’s the exact meaning you think it should be, but it’s not “declare,” it’s “engage.” It has an exception for sudden attacks in it. It’s exactly what Ely thought the war powers framework should be.

I didn’t think it was going to be controversial, because the other thing about this time is war was not an interesting issue anymore. We were post–Cold War. We’re in this new world order and the UN was going to improve everything. That’s the other thing. I got interested more from a career perspective than just genuine, pure interest.

Right here is an area where there is enormous consensus and no other side, at least in the academy. There is consensus, scholarly view, and then practice is consistently against it. That’s an area to work and write about. Then it’s an area where there are not that many people writing, so that means it’s an area where a young guy could actually write about and make a difference, make a career for himself. That’s the other thing I thought of from a career perspective. If I had gone in with the interest of writing something out front about affirmative action, that would not have been a good career move, because I’d just be like the 400th law professor to write about affirmative action. But war powers I could see, there’s only about one position and six or seven people have it and they’re all relying on the exact same sources. Ely’s book was good because it kind of coalesced all the arguments that they had all been making in one place in a very well-written product, but it’s all the same data. There has to be more.

I did realize it would be controversial in the academy but I thought in the real world it wouldn’t matter because Presidents are doing this anyway and Congress isn’t stopping them, so why would they even care?

Nelson: You didn’t think, *When I finally am able to get this article out there, I’m going to send it to the President’s—* whoever in the administration would be willing to read this—*because they’re going to appreciate this?*

Yoo: In a very funny way, it comes out in the Clinton years. This is funny. There is this guy named Bill Treanor, who is now the dean at Georgetown Law School. He was a professor at Fordham at the time. He wrote a piece in reaction to my piece. I think he had this argument where the historical theory that he was using was too far off the constitutional text. He said the framers were worried about people pursuing fame, so he said they're worried about Presidents trying to become famous. He said, "Therefore we should read every ambiguous constitutional provision involving the Presidency to limit it rather than expand it." He said war powers should go to Congress, but he said a lot of nice things about my article, the new stuff I found.

He had the job I was going to have in the Justice Department under Clinton. I spent a year in D.C. as a fellow. I went by to see him and to have lunch.

Riley: Which year was this, John?

Yoo: This would have been '99, I guess—'98, '99.

Kassop: Where were you a fellow?

Yoo: I got a fellowship from the Olin Foundation just to take a year off and finish up some academic work, so I spent it at GW [George Washington University]. They gave me an office in the library. I did a lot of research there. Since I wasn't on the faculty, I could go to lunch with someone else in Washington that I was friends with. I had lunch with Treanor. He took me by the OLC [Office of Legal Counsel] and I remember giving him a hard time about all the stuff going on in Bosnia and Kosovo. "Bill, I notice that you guys haven't asked for a congressional declaration of war. Our *Law Review* article would be very helpful." He laughed. But they ended up citing it in the opinion on Kosovo because I was giving him such a hard time.

He said something like, "I've really come to understand the benefits of your point of view, even though when I was an academic I had taken the exact opposite view." That's how I got introduced in terms of—I remember I wrote an op-ed in the *Wall Street Journal* when Clinton first started intervening in Bosnia and saying all these Senators who attacked Reagan and Bush have not said anything about war powers. I said I have this view that I published in *Law Review* and I think Clinton has the constitutional authority to do this, but at least they should settle the matter and all those Democrats who attacked Bush and Reagan should either demand that Clinton get a declaration of war or just shut up about this in the future, because it's clear we have a settlement now. That's the other way I tried to get the view out, by writing op-eds whenever there was a war issue.

But I didn't think it would matter that much, because it seemed to me there was this kind of operating settlement that Presidents would do it and Congress wouldn't complain, so it would never come up. There were never any hearings in Congress about war powers during this period. All the interventions were small.

There was this other thing I saw where Walter Dellinger [III], who became head of OLC, had attacked Bush for not getting a declaration of war for the Persian Gulf War before he got one. But before that he signed a letter. Then he was head of OLC when Clinton intervened in Haiti. So he got crapped on. Harold Koh I think wrote a public letter to him saying he was violating his duty as a government official for doing something he personally believed was unconstitutional

by saying—He said Clinton had the authority to go into Haiti without any congressional approval.

I remember Dellinger writing an article. I still don't see how he reconciled the two, but he said basically as a government official you have to take different positions than as a scholar and you shouldn't expect them to be consistent, in fact they shouldn't be consistent, and so on and so forth. I remember that also came up during this time in the war powers area. But it wasn't a big heated thing in the '90s. It really wasn't, I don't think.

Kassop: Well, I guess the Dellinger OLC opinion on Haiti was basically saying that the War Powers Resolution—Unlike when it is, what the people who wrote thought it was going to do was to restrain the President, but it does just the opposite. It actually gives the President authority. He wrote this—

Yoo: Which is totally untrue and deserves—The legislative history—Nobody wanted to give Nixon more power to—

Kassop: The final result was a compromise, and in fact it may have been stronger with the Senate version, which never got accepted, but yes, Dellinger was right in there on Executive power when it comes to the war powers.

Yoo: Yes, but when he was a mere professor at Duke, he signed this joint letter of war powers scholars saying you have to get a declaration of war or any attack on Iraq would be unconstitutional, and he brought a lawsuit too. They brought a lawsuit in the D.C. District Court.

Kassop: Well, the Dellinger versus Bush—

Yoo: Yes.

Riley: We're going to have to break here in just a minute because you have a lunch date. My question is, there are some other things going on with the Presidency in '98, '99—

Yoo: Monica Lewinsky and everything.

Riley: In your view, was *Clinton v. [Paula] Jones* wrongly decided? Is that something—

Yoo: This is interesting. This did come up—This is where I met Mike Chertoff for the first time. Senator Hatch was a special member of the Senate Whitewater committee. This is an area I just knew nothing about, I never got involved with. It does color my view about the Presidency since—so I work on those issues for Hatch, even though he is not a member of the Banking Committee.

Riley: This is earlier.

Yoo: Yes, '95, '96. But even then all these Executive power privilege issues come up, congressional subpoena issues. I'm a law professor guy there. They had me write up all the briefs on the Senate side explaining why it is issuing a subpoena, why executive privilege doesn't apply in these cases, and so on. Mike Chertoff is the chief counsel, special counsel to the committee. I

work very closely with him. His deputy is a woman named Alice Fisher, who becomes head of the criminal division after Mike. That's where I first met the two of them.

It's funny. On some of those issues, that's where I really had this conflict between working for Congress and the Presidency. I never took the position that some people would that there is no such thing as executive privilege from discovery of information. I tried to be more sensitive to that line. Then after I leave, when the Lewinsky thing—I start getting asked to write more about it by the *Wall Street Journal*. I try to say there is a legitimate area and then there is an area where it can't be claimed, and the question is, Is what Clinton's doing falling—

But part of what I wanted to do was try to limit Republicans, both when I was a staffer and then in the writings, about not taking the view that there is no such thing as executive privilege, because some of the congressional Republicans in the Lewinsky thing take arguments that become very similar to very liberal Democrats about Presidential powers. I try to prevent that from happening. I think that is consistent with Hatch's view, because Hatch had been very public in supporting Presidential power when Reagan was President. I would say to him, "You can't take these kinds of positions that some of the new Senators are, because you have a track record. You defended Reagan's claim of executive privilege."

He even went further. I think Hatch had even thought the Boland Amendment was unconstitutional, which is not my view. But anyway, that got me into this whole nitty-gritty world of executive privilege versus Congress. I wrote a law review article in the end about it because it got me interested in when was the first time executive privilege ever was claimed. I ended up writing what I always thought was a great article. No one cared about Aaron Burr and the Jefferson claim, because that's the first time executive privilege is—Thomas Jefferson refusing to turn over documents to John Marshall, who is the appeals judge in that case. I found all this interesting stuff—how Marshall directly ordered Jefferson that he might have to appear in court, the exact *Clinton v. Jones* issue. Jefferson made the exact same argument Clinton did, "I'm so busy. If I were subject to subpoenas in court cases, I'd be called from one end of the country to the other. It would be my whole job."

The interesting thing is Marshall then sent the subpoena, but he didn't enforce it. I thought the argument—The piece said it was a political settlement. Marshall claimed that he could make Jefferson appear in court and even issued a subpoena for that effect, but then he never made Jefferson appear in court in the Burr trial. That's how I thought of the executive privilege thing. I didn't write that piece for about two years, during the Lewinsky thing. Also Ken Starr, who was the Whitewater investigator—I'd met him also when I was clerking for Silberman—he tried to recruit me to come work for him.

Riley: On the investigation?

Yoo: No, just to work for him in his law firm.

Riley: I see. Let me come back and generally pose a question. Were you detecting things in the political system in the second Clinton term that concerned you as a constitutional scholar in terms of the balance between—

Yoo: I thought some of the Clinton claims of executive privilege went too far.

Riley: OK.

Yoo: My view had been that it's about national security, what *Nixon v. U.S.* says—diplomatic, national security, military affairs—and then after that it is a balance. Some of the Clinton claims were pushing that, where the absolute line goes, or at the very least I thought the Senate had a right to say, “Here's our need for it and let's see how the balance comes out.”

On the other hand, I tried to defend the Clinton administration's claims of constitutional authority in the foreign affairs area and I would say I don't agree with the policy, but I think they can do it constitutionally. The two areas where I did this really were Kosovo, and I also did it with the antiballistic missile treaty, that's the other area. Clinton—The standard international view would have been that once the Soviet Union ceased to exist there was a big question whether the ABM [antiballistic missile] treaty existed anymore because the other party doesn't exist.

Clinton said, “I interpret the ABM treaty, for purposes of whether the Soviet Union exists, to still exist anyway.” So I said, “I don't think it exists, but I think the President is the one for our country who interprets that obligation for us.” But then I also said, “But Congress can use its funding power to build a new missile defense anyway. The President can try to veto it if he wants and Congress can violate the treaty.” I did have this political theory about the separation of powers interacting with that. I did try to defend the constitutional aspects of what he was doing.

So that's a long—For example, in *Clinton v. Jones* I think that constitutionally the President is not immune from private lawsuits for pre-Presidential activity or post-Presidential activity, but I thought there ought to be a political settlement about when he had to appear, just like Marshall and Jefferson. I actually wrote an op-ed about this, but the paper didn't publish it. The judge just needs scheduling authority to schedule the deposition for the day after Clinton leaves office.

Kassop: Which is really what the decision said.

Yoo: Yes, the decision says there is space for that. That's why it's a unanimous decision.

Riley: It leaves space for it.

Yoo: It just says for the district judge to manage this appropriately.

Kassop: Which of course was unrealistic, but—

Riley: It was not the tenor of the—

Yoo: No, it was definitely a smackdown. And Silberman, who was very pro-Executive power, actually wrote some of the lower court decisions, sort of caving the claims of executive privilege. He had the same dilemma about how do you reconcile robust Executive power with what Clinton is doing.

Riley: Exactly.

Yoo: A lot of Republicans were put in that position by Clinton.

Riley: Sure. We almost have you to the Justice Department. It's fascinating. It's all extremely valuable. You've earned a good break with lunch with your mentor. We're staying mum about what you said, but you can feel free to tell him what you've been talking about.

[BREAK]

Nelson: We were thinking about loose ends from this morning. Some may have occurred to you, but one that occurred to us was your mention of being offered a judgeship. Could you say a little more about that, when that was?

Yoo: That was in the first term of the Bush administration. It was two times, one when I first got there and then they were starting to put together a list for judges. The Ninth Circuit, where I'm from, is a circuit that is very liberal, where it is hard for people to get confirmed who are conservatives. I'm pretty sure there was a California opening. I'm a minority; the Republicans have no difficulty finding nominees for judgeships, obviously conservative and well known in the legal community. That was before 9/11. The other was I think—

Nelson: Was this for the court of appeals?

Yoo: Yes. I'm not qualified to be a trial judge; you have to make rulings on evidence and cross-examinations. Then the other time that they approached me was when I was leaving at the end of the two years and I wanted to go back into teaching. I was basically asked, "If you stay on, we'll let you pick from a variety of jobs afterward." They didn't call it a reward, per se, but it was like a quid pro quo for staying on a little longer. They basically said, "We can nominate you for a judge if you like, or a variety of other things." At that point I just wasn't interested in staying on longer.

Riley: You're being approached by somebody in the counsel's office?

Yoo: The White House counsel, Alberto Gonzales.

Nelson: Was there a specific spot on the Ninth Circuit? And was that the one that Jay Bybee—

Yoo: Jay is from Nevada. They're circuit seats but they're assigned to different states, so—

Nelson: I see.

Yoo: I wouldn't be able to sit in his—I'm not sure whether one was open by then, two years later, but the Ninth Circuit and the California seats—There are so many of them, they come open fairly regularly. I don't remember checking the second time whether there was available—The first time they asked me I did talk to Silberman. I guess I was—2001, I guess I was 34 at the time, and Silberman said even if you wanted to be a judge, this is way too young to be one. You just would get frustrated with the job. He always thought that you shouldn't be a judge until you're 50. I think he thought all your energy is gone from fighting with the world or something, I

don't know. He had this theory about judges being too young on the bench, so he said I shouldn't do it anyway. By then I wasn't interested.

Kassop: When you said you were offered it when you first came on in 2001, you came on in July of 2001.

Yoo: This is probably around September.

Kassop: Just before September 11.

Yoo: Maybe August even. What they'd done, before I came—In the late spring they had nominated a whole bunch of 15 or 16 circuit judges all at once, then the counsel's office, just going through the normal process of filling other slots.

Kassop: But I guess I'm saying when they asked you it was before you had even done any work for them really.

Yoo: Oh yes. Because I think I would be on a list of people they would just think about. I was a Supreme Court clerk, I was in California, I was conservative, I had supported Bush. The Republican strategy from the Reagan days had been to find younger Republican academics and put them on the courts.

Kassop: The way I describe it to my students is young, healthy, and conservative.

Yoo: Yes.

Kassop: That would be completely the opposite of Silberman's point of view, where they want them to stay on for a long time.

Yoo: Exactly. But Judge [J.] Harvie Wilkinson, he was put on the bench when I think he was 38; he was a UVA law professor. He is still active, sitting now. The Bush administration did, I think, try to continue on a lot of Reagan governing strategies. The approach to the judiciary I think was identical. Reagan-Bush, the first time, they didn't put in Alito, Roberts, when they were maybe 40 at best. But I just wasn't—

The funny thing is that people in the White House counsel's office who were in charge of coming up with the names for these seats are all people who are friends of mine, of the same generation. I knew a lot of them. They were absolutely dumbfounded that I wasn't interested. For most of them that's what they're shooting for in the end, to have a successful career and practice and then be an appellate court judge. They just thought I was out of my mind.

Kassop: It seems like you really enjoy teaching.

Yoo: I do. I really like the writing part of it. Yes, and again, a lot of these guys, men and women, they want to be on the Supreme Court. That's really—The only route nowadays to do it is to become an appellate court judge.

Riley: Let's take you back, then. Some of this we don't really have the full, proper context yet. So we get you back to California after your latest—You have the Olin grant [John M. Olin Faculty Fellowship] in '99. You go back to California at that point. How early do you begin—I can't remember whether you were officially affiliated with the campaign. Do you take a position with the campaign?

Yoo: I was on some advisory committee, like Law Professors for Bush-[Richard B.] Cheney. But we didn't do a single thing. We didn't do anything.

Kassop: Best kind of committee to be on.

Yoo: Yes, I think they just wanted to have a list somewhere where they could say there were some professors who supported Bush-Cheney.

Riley: That was the extent of your involvement in the campaign?

Yoo: Yes, we really didn't do anything. There was a cochair. I don't even remember who the other cochair was. That was all that it was. Then I got involved more after the election, when the recount happened. Like I said, the other area I wrote in, mostly inspired by the work on the Court when I clerked, was judicial review and federalism issues. That's what Florida was, to me anyway. It really became an issue about federal judicial power versus states' rights.

I started writing op-eds and I was on TV a lot during this time. I wasn't paid by the Bush campaign. I was definitely representing that side of the debate, but I wasn't affiliated with the recount or anything like that. I probably wrote four or five op-eds in that I guess it was a month-and-a-half period and I was on TV a lot.

Riley: Were you being called by the campaign at all about your— ?

Yoo: No, I was talking to other conservative law professors about some of the ideas and issues. Some of them had consulted with the recount, but I don't think I ever talked to anyone who was officially involved, the people who were actually writing the briefs and stuff like that. I did that because I thought I wouldn't want to be on TV saying these things and then someone saying have you been working with the recount. I have to say no. I wasn't actually intertwined in any way with them. But I knew all the people.

Kassop: Olson, obviously.

Yoo: Yes, Ted and also most of the junior lawyers who were writing all the papers were all friends of mine from clerking.

Kassop: What was your position on the federalism issue?

Yoo: It was interesting. I think I was the one who discovered the statute, the one about when the electoral votes had to be turned in. In my time in Congress, I was—If the Constitution says the votes have to be counted, I'm sure there is a statute that sets out the procedure, because there's no way anything—Nobody in the Senate or the House does anything just immediately from the Constitution. I remember I was talking to my senior colleague, Jesse Choper. We're arguing

about this and I said there's got to be statutes. I pulled the book off and I just started reading the part in the very beginning of the [United States] Code. There's a statute and it has a very detailed process.

Kassop: That was the safe harbor statute?

Yoo: Yes, the one that says if you get your electoral votes in by whatever day—

Kassop: December 18.

Nelson: December 12.

Yoo: And if you don't, then they might not be considered legitimate. The first things I started writing, actually, was there is a statute and the states have a right to run the election, but they have a legal obligation to get the vote in by this date. The *Bush v. [Albert, Jr.] Gore* case, although I had written a little bit about the equal protection argument, that wasn't really my thing. I was much more about complying with the Constitution and Articles I and II setting out how you do the election, which is not the ground the Court actually decided the case on.

Kassop: Were your writings transmitted to the lawyers who were actually writing the briefs?

Yoo: I talked to them on the phone about it.

Kassop: They did use your argument?

Yoo: Well, the equal protection thing was such a—I'm sure I was talking to someone; it might have been Choper or somebody, with a conservative lawyer. Because conservatives are not really into voting rights; most of the people who study voting rights in the legal academy are pretty liberal folks. But I remember talking to someone. It might have been one of my coclerks from Thomas or something. I just remember all this equal protection stuff with voting rights. That's how the Court talks about voting rights all the time; it's the way it is analyzed. I remember I threw it into an editorial, just a few paragraphs. Then I remember talking to general people who were—I went down to the Florida legislature and I testified. They called me down after an op-ed and I testified, mostly about the Article II argument. But I might have mentioned briefly an equal protection claim.

Then afterward I met with the lawyers. I just had dinner because I was friendly with them. They're not allowed to tell me anything that they're working on because I'm not actually working for the recount, so I had a friendly dinner. I told them what I'd said. I don't know what they did with it, or maybe they'd already—It's very likely they may have already done it or thought about doing it. That's the extent of how involved with them I was, socially almost. Two guys who were working on the recount were Tim Flanigan, who becomes deputy White House counsel, and one of the other guys is John Manning, who is nominated to become the head of OLC. He is the one who hires me, but then doesn't get through clearance and doesn't get the job.

Riley: How soon do you start thinking about the prospect of going in? Are you, at the point of the election, are you thinking, *Maybe this is something I would be interested in doing?* Or your heart is in California and you want to be there and teach?

Yoo: One thing I really wanted to do is work in the executive branch at some point, because I thought it was funny that I was already by then writing a lot about Presidential power and I'd worked in the other branches, but not the executive branch. My claim to having on-the-ground knowledge is backward from what my specialty was. I really wanted to work there. I wasn't really so keen about what it was exactly, although OLC is usually where law professors end up going.

I guess in December during the transition I was interviewed first by Gonzales for a position in the White House counsel's office. It's funny; this is pre-9/11, so he was really focused on nominations. I had done that on the Senate side, so he was really eager to try to get me to come on. I turned it down because I said I wanted to work on national security issues if I could. But that's when I first met him, and I first met [David] Addington then, because he was sitting in on the interviews, although I didn't know who he was at the time. They didn't even have a deputy White House counsel then.

Riley: Let me press you about one piece of this. There are counsels deputed to the National Security Council, right?

Yoo: Right, that was the ideal job I would have wanted. I actually said that to them. There's a lawyer who is the counsel to the National Security Council who is also dual-hatted with the White House counsel's office. I said, "Look, that would be the perfect job for my interests because I could help with the nominations and stuff. I know all the Senators who do that."

Riley: Right.

Yoo: "But my primary scholarly interest is national security." I said, "I bet you don't have a lot of candidates who actually know anything about war powers who would do that." But they ended up hiring a guy named John Bellinger [III].

Riley: Yes. Now was it because John was already in the pipeline on this, or because they were going to leave that decision to Condi [Condoleezza Rice]?

Yoo: I'm pretty sure what happened was that basically Condoleezza Rice—I only heard gossip about what happened—that Condoleezza Rice wanted somebody else. It might have been Phil Zelikow. So Bellinger, who was already in the government, I believe was a compromise. Neither the White House counsel nor the National Security Council would take the other person's candidate. It was a sort of power struggle.

Riley: So you're left on the outside from that process.

Yoo: Yes. In February or March I get asked to interview in the Defense Department. I interview to be a deputy in the general counsel's office of the Department of Defense.

Riley: And you're asked by somebody at Defense or somebody at the White House?

Yoo: It's a person who's inside the Defense Department who's in charge of personnel issues and the transition named Carol Adelman, who is the wife of Ken Adelman. Ken and Carol Adelman were at that time [Donald] Rumsfeld groupies from back when Rumsfeld was the head of the

Office of Economic Opportunity in the Nixon era. I think he had Ken and Carol come in and staff up the political appointees to the office. I didn't interview with Rumsfeld. I don't think he was there that day, but I interviewed with [Paul] Wolfowitz. Jim [William, II] Haynes, who became general counsel, wasn't in the office, hadn't been confirmed yet, so I didn't interview with him.

I met him later, but he couldn't interview me or give me a job because he wasn't actually in office himself. I interviewed with a bunch of other political appointees who I don't really remember. Then maybe one or two weeks later I got asked to interview at Justice for deputy to OLC. I interviewed with Ashcroft and the head of OLC was unconfirmed, so there was no one there to interview with. I interviewed with people at the White House, Presidential personnel. The Justice Department gave me a job offer first, even though I think my preference might have been to work in the Defense Department.

I think I was talking to Silberman about it. Silberman was old friends with Rumsfeld. I had written an article about the antiballistic missile treaty about this issue we were talking about, can the President interpret the treaty to keep the Soviet Union in existence. Silberman told me he took the article, which is an 80-page law review article, and personally gave it to Rumsfeld at a party and said, "You've got to hire this guy." I was really excited by that. Also, I wanted to do something that was different in a way, that wasn't—All my friends were working in the Justice Department. I wanted to do something that wasn't just purely law. The Justice Department gave me a job offer first.

Riley: No overtures from the State Department?

Yoo: No.

Riley: The intelligence—

Yoo: That's way—The guy who is the head of the legal department is Will Taft, who is really senior, and [Colin] Powell basically staffs the whole department himself. There's almost no White House involvement in that, I think. It was mostly Defense and Justice.

Riley: They make you the offer in—

Yoo: This must have been April or May; it may have been May. It was very late in the season. I couldn't have gone earlier anyway because of the semester; I was teaching. I don't remember the exact date. Initially it was because John Manning, who was going to be head of the office, wanted me to come in and do it. He gave them a list of names of people to interview. I think I was the first one to interview.

Riley: Over the course of the interviews was there already a well-established portfolio for somebody in OLC to—

Yoo: Yes, one person in the office has always been in charge of foreign affairs and national security, so yes, that was obviously the thing they were thinking of me for.

Nelson: What's OLC like? How big is it? What's the mix of career and political appointees?

Yoo: It's 20 lawyers, I think four political appointees and 16—It's probably bigger now; it's probably around 20 career staff. All the political ones are at the deputy assistant level. The attorneys who do the basic work are all career. There is one Assistant Attorney General; it might be the smallest actual unit within the Justice Department, because 20 lawyers is tiny. Some departments have hundreds and hundreds of them. It used to be traditionally on the fifth floor of the Justice Department building, which is just down the hall from the Attorney General's office.

At this time in 2001 the office building was undergoing renovation, so we were on I think the third floor. But usually it's considered, I think, the office that is most important after the Solicitor General's office. Traditionally after the Attorney General, the Solicitor General's office is considered the most important unit. I think OLC is next, and then the criminal division.

Nelson: So really high-caliber career people?

Yoo: I'm sure all the career people have clerked at the circuit court level. Most of them or many of them clerked at the Supreme Court. It's funny, of the career people, there are four lifetime civil servants who have been there 15, 20 years, will probably spend their whole career there. So there are four there. Then I guess that means 12 to 16 who are mostly—It's something people often do right out of clerkship. They do it for two or three years and then they go on to something else. That's usually much of the other people, although they could stay their whole careers if they want. It's kind of like another clerkship almost.

Nelson: Most of the folks who work there had started working during the Clinton years, I'm guessing.

Yoo: Yes, there's a traditional changing of the guard. Some people stay, a lot of people go. It's not like the criminal division, which is you just prosecute the cases. OLC is more involved with the President's political agenda, because you're going to be called on to defend the constitutionality of different things. When I got there, that transition was already occurring. There were career people hired under Clinton who were leaving, although not all of them left. There were people coming in who were mostly Republican asking to replace them.

Nelson: Was there a kind of culture of the place or an ethic of the place that you're really there—Whoever is President, you were there to work for that person?

Yoo: The ideal of it was that you were there to defend the constitutional prerogatives of the Presidency. Some people call the job the "President's lawyer." I think Doug Kmiec, who was head of the office—He was only there for a year or two, but he wrote a book about it, *The Attorney General's Lawyer*, but there is this idea that you're there to defend—There are two functions: You're there to judge the constitutionality of bills that are proposed in Congress and whether the President should sign or veto. That's one big part of the job. A second big part of the job is approving Executive orders, things like that, for constitutionality review and legal review; make sure you don't do anything in those Executive orders inconsistent with existing law.

The third big practice area is foreign affairs, the national security area. But they're all part of defining the executive's, the President's, powers. Then there is a fourth one, which is advising the Attorney General and the Justice Department's responsibilities, which is not as big a deal, usually.

So peacetime you look at the published opinions that they put out. In peacetime the job can be relatively boring. Sometimes they're about does this national monument fall in the National Monuments Act; there's an opinion about that. Or can the President recess appoint this person, things like that. Those are the bread and butter of the office when you're in peacetime. But when there are conflicts between the branches, then it becomes quite important. It was very busy under Reagan, not so busy under Bush One [George H. W. Bush] I think, except for Somalia and the Persian Gulf War. But Reagan was really one who—All these court cases and the litigation strategy and deregulation, he had generated a lot of work at OLC because he really did try to expand Presidential powers exercise.

Nelson: Did you feel like it was your job to—not you in particular but in that office—to find ways to baptize what the President wanted to do with constitutionality or to give him independent advice, some of which might be unwelcome?

Yoo: I think they're both in a way the same thing. What usually happens is the White House counsel or the Attorney General's office would say we want to do this, something. Then part of our job is to say if you do it, you have four ways to do it. If you do it the first two ways, it will be unconstitutional. If you do it in these latter two ways, it will be constitutional. The latter two ways might not be as fully effective as the first ways in achieving what you want, but they're constitutional. It happens all the time.

The statutory role or the Executive order role is a little different. You're not just advising on proposals; you're reviewing legislation that has already passed. Then it's more this is either constitutional or unconstitutional. But take for example the [USA] PATRIOT Act [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act]—I got really heavily involved in the Patriot Act. There was this desire to make it easier to get warrants for national security wiretaps. The White House would say—actually parts of Justice and the White House would both ask us and say—“Can we change the standard to get a national security wiretap from A to B?” We might say, “Look, you might not be able to get it from A to B, but you could get somewhere halfway that would be constitutional. If you try to go all the way to here you might have a serious problem.”

Then you tell them that. It's still up to them to decide what they're going to try to do, but they have our advice. Usually we're the last word in the government—OLC is the last word in the executive branch about constitutionality in terms of our view. So if you said something was unconstitutional, usually they're not going to do it. I try to think of them as the same thing because I think that's just sort of standard with clients and lawyers generally. Clients say we want to buy this company or something and the lawyer's job is to say, “You can't do it in these two ways. You could do it these other two ways.”

Nelson: What we've talked about so far is the drafting stage or the submission stage, but if Congress passes a bill and it comes to you for review, would you say you can sign it if you want, but in your signing statement indicate that—

Yoo: Sometimes we could do that. There were certain areas like national security where OLC would traditionally put in—I almost think of it as boilerplate—language, saying we're not going to, even though Congress may have—Congress often orders the President how to vote at the UN,

for example. They just over and over do it, even though they know it is unconstitutional, at least the executive branch thinks it is unconstitutional. But they always say, “You must vote for this or that at this body or this meeting.” We’ll always say—There’s language that is just cut and paste almost: “The President takes note of Congress’s preferences, but as you know, we think it is unconstitutional for Congress to direct the President how to vote.” A lot of those are in the national security area. But anyway, there would be these kinds of traditional positions that OLC had taken and the Presidency had taken against Congress in certain areas. Then in those areas we would have standard language for signing statements that we were just using.

If you look at the signing statement—There was a big flare up about the numerical use of them, but I think the substantive language is very similar. In fact, Obama is still using some of them now. He signed a bill last year about—

Kassop: The Defense Authorization Bill.

Yoo: Yes, he actually had our language; it is very close to the Bush language. But the Bush language is very close to the Clinton language and the Clinton language is very close to Reagan, and it goes all the way back to Nixon, really, some of that language. I think that’s where the practice really started; it was under Nixon.

Kassop: I think it began mostly under Reagan, though, and it was really under Meese. And Meese wanted the signing statements to be considered the equivalent of legislative—

Yoo: Meese institutionally tried—I think Nixon has this famous signing statement about the War Powers Resolution. We always kind of think of that as the—I mean even [Wolfgang] Ischinger—

Kassop: Excuse me, that’s not correct, because Nixon vetoed the War Powers Resolution.

Yoo: It’s not his signing statement; it’s the veto message. You’re right.

Kassop: The whole point of the signing statement—

Yoo: It’s the veto message, you’re right. I don’t think of them as being all that different; they’re just Presidential announcements when he does something. But there was a big difference with Meese. He wanted signing statements to be part of the legislative history. So he convinced—There’s a legal publisher—

Kassop: eScan.

Yoo: Yes, eScan, that publishes the legislative history. He was the one who got them to include signing statements along with committee reports, and that had never happened; in fact, they were very hard to find before that. But anyway, with the signing statements, that was part of the practice. You looked at the bill, you made recommendations about signing or not, and then you could make recommendations about the signing statement. Usually you wouldn’t vary much from the practice, so before 9/11 the biggest area this happened with was the McCain-[Russell] Feingold campaign finance bill [Bipartisan Campaign Reform Act of 2002]. There were these

provisions, which eventually were struck down by the Court, about can you advertise during the campaign as a third party. There's stuff about signs near polling places and things like that.

We thought that there were free speech problems with some of those, on the grounds that the Court eventually upheld. We said, "We think these are unconstitutional." It is still up to the President to decide whether to veto or not, and he signed it. He signed it. He didn't veto the act. But he also I think included signing statement language saying, "I think these might be unconstitutional. I'll defend them in court, but I don't think they're constitutional." I didn't work on that signing statement, but I think there he took the language from OLC.

That work is all done by the White House counsel's office. We just make the recommendation about the signing statement language.

Kassop: Do you have any idea what the level of agreement is between your recommendations to the White House counsel's office and the White House counsel's office agreeing and adopting?

Yoo: I don't have empirical data, but my sense is that the White House signs a lot more bills than we would recommend he sign, that OLC often finds these constitutional issues and the White House more often than not is not going to act on them, because they have their own political calculation.

I was just thinking, when's the last time the President vetoed a bill purely on constitutional grounds? I can't think of one under Bush where he said, "I'm only vetoing this because it is unconstitutional. I like the policy otherwise." But I couldn't give you numbers.

Kassop: I guess I was also thinking not only on bill signing, but on other issues of interpreting the President's constitutional powers, what is the level of agreement or disagreement between OLC recommendations and White House adoption?

Yoo: I wouldn't call it agreement, because I think the White House counsel's office doesn't, for example, say, "Your interpretation is wrong and we have our own different one." Usually the way they treat it—My sense, just from experience, was that they would take the Justice Department view as the binding view, but then they would say there are political considerations about whether to raise that argument or not, or whether to claim the power or not at this time. That's going to be the final weight on the scale deciding what they do. I'd see plenty of times when that would be the thing that would win out, which is not surprising.

Riley: Let me ask a naïve question, because this is not my area of specialty. I'm curious about why the OLC exists in the Department of Justice rather than as an adjunct or as a core function of the White House counsel.

Yoo: Actually, you know what? It used to be part of the Solicitor General's office. It's interesting. The Attorney General—For most of its history, it didn't have a department, he was just one person. I mean, it wasn't one person, but the Attorney General was a position. There was no Department of Justice until 1875. The original job of the Attorney General was OLC's function. So you read about the fights in the Washington administration and the Jefferson administration over the legal meaning of the Constitution. There's just one Attorney General and all he is doing is giving advice to the President about what he thinks the Constitution means. It's

just funny that that function, which is the original function, is now just this little office. Most of the department does something else, which is what other countries have their Ministry of the Interior do, which is fighting crime, essentially.

That big change is really not just of 1875 but then the 1900s, 1920s, 1930s and the rise of the FBI [Federal Bureau of Investigation] and federal prosecution as an important aspect of the federal government's job. I guess I haven't seen a good history of the office. I've read the ones that exist and they don't usually think about it this way, but it seems to me that when you have the rise of the administrative state there are inevitably conflicts between agencies about who gets the right to do things.

Riley: Sure.

Yoo: Originally all those fights are given to the Solicitor General's office to resolve because—I don't know why he or she gets that job back in the—This I think happens before the 1930s.

Kassop: In 1925.

Yoo: I think it might happen under FDR? I don't remember when the SG [solicitor general] starts doing it. I know in the '30s under Roosevelt they create a special division within the SG's office that eventually just does that alone and doesn't argue cases at the Supreme Court. That office becomes OLC. That's why it's still seen as next in prestige after the Solicitor General's office, because it once was part—Then that detaches and I think it was in the '50s when Congress first enacts the statute creating the separate office.

But it's not the White House counsel. You see, the White House counsel has a completely different historical origin. The White House counsel was the President's personal lawyer.

Riley: That I understand. And I think your answer is that this vestige of historical development is that the function exists in the Justice Department rather than in the counsel's office. I suppose I'm asking as a thought experiment: Is there a good reason, not from history but from pragmatic functional allocation, why this shouldn't functionally be in the counsel's office?

Yoo: I guess there always has to be someone who—I think there is always going to be something like this, because there is someone who represents the executive, thinks about the executive branch versus the individual who is the President. The White House counsel—Actually, this is a constant tension, something I've witnessed a lot—There is a lot of tussle between the White House counsel and the Attorney General, because the White House counsel's job has expanded over time to include things that aren't just about who happens to be President.

I used to think the typical White House counsel's job was if you at the Miller Center put a picture of the President up without paying for it they would write letters all the time to take down that image of the President; you can't use it for commercial purposes. They spend a lot of time safeguarding. They would fight over where the papers of the President were going to go after he retires.

Read about the Nixon White House counsel. They were fighting about Presidential papers and about Watergate, which is about the individual of the President. But by the time I get there, the

White House counsel's office has really expanded. This is a story that I don't think has really been written about by academics as much, and certainly not by legal scholars, but by the time I get there the White House counsel is picking all the judgeships in the country, except for the district court, and mostly just because there's too many of them.

If you read histories of Nixon and even parts of Reagan, the White House counsel is not picking appellate court judges. They get involved with the Supreme Court, but really it's the Attorney General who used to run that whole operation. There's still an office in Justice that does that, but now they just prepare them for confirmation, they don't actually pick. That's a huge expansion of the power of the counsel's office.

Riley: Sure.

Yoo: You can say in a way that happened in national security, too, under the last administration. White House counsels weren't really involved in foreign policy, and now it might be the primary, under Bush I think it became the primary, function of the office to get involved in these Presidential-power questions.

Riley: But your answer also suggests that there is a complication in who the actual client of the OLC is, right? Because the client isn't the person who is—

Yoo: No, it's not the person who is the President.

Riley: It's the throne—That's the wrong word.

Yoo: It's the office.

Riley: It's the chair behind the *Resolute* desk.

Yoo: It is the office and then the executive branch.

Riley: Do you recall having in your days there tensions ever in this, on this very question?

Yoo: They were much more acute under Clinton because of the investigations. I'm sure the second-term Bush people had to think about it a lot more than we did because there were so many investigations going on. In the first term when I was there, there weren't a lot of investigations. But that issue really comes up the most with executive privilege. It comes up the most when it comes to legal advice, medical, science. If the individual was getting legal advice, it would be privileged, but there is a big argument about if the President gets legal advice, whether the office of the Presidency is privileged at all. That is a good example of what you're talking about. But I didn't see our job as having anything to do with George W. Bush the person. It was more about the Presidency as it existed before and as it would exist after he was gone.

Kassop: Can I just jump in here? One of the things you didn't mention—I have done some work on the distinction between OLC and the White House counsel's office and you described OLC as the President's lawyer, which in fact is often the way the White House counsel's office is described.

Yoo: I think that's quite a mistake.

Kassop: And that's not accurate. Really it is the lawyer for the institution of the Presidency—

Yoo: Yes.

Kassop: —which is the White House counsel's office. But on the other hand, OLC, as Russell has pointed out, does have this sort of tension within it, in that in fact it is not, at least as I understand it, necessarily the branch that is the lawyer for the Presidency; it's the branch for the interpretation of Executive powers within the entire government. There's a certain level of independence that Justice is supposed to have from the White House.

Yoo: I think that's right. The function of the office when the agencies have disputes with each other, that's certainly the function of the office, interpreting for the whole executive branch. I guess when it comes to the national security issues, the executive branch issues and the Office of the President issues start to merge. That's why I think of it as we press the prerogatives of the Presidency against the other two branches. I think that's OLC's—It doesn't happen as much in peacetime, but in wartime I think that's the big part, and that's the business generator of the office's work.

I'm trying to think of cases where the executive branch might have one position and the President might have a different position arise. It's very unusual, but they arise a lot with the independent counsel issues. In that case OLC took the President's side over—under Reagan, they did; under Clinton, [Janet] Reno withdrew the Justice Department from any involvement. I don't think because of a legal bar, but Reno and the Clinton White House came to some kind of understanding about the Justice Department not doing work on anything having to involve the Whitewater investigation, even when they involved things that would normally be within the Justice—like defending executive privilege. The White House counsel's office took those things over too, even though they didn't have to. That would traditionally have been under Justice anyway.

During my time there, I'm trying to think of when there was a case where there was that kind of conflict, and I'm just drawing a blank right now. But certainly it could happen.

Kassop: I happen to have been at the confirmation hearings for Eric Holder [Jr.] for Attorney General, and he was constantly being questioned about the role of the Department of Justice as being independent of the President. It's true on one hand they're obviously appointees of the President, and he was asked specifically, "If your interpretation was different from the President's, would you feel comfortable saying that in fact you were differing from him?" He said yes. He said, "On the other hand, if the President decides that he doesn't like it, he can always fire me." But there is this tradition of independence on the part of the Department of Justice.

Yoo: Yes, I think it is overstated a little bit the way he puts it. It's not an independent agency—and also I think under the Constitution the President is the final interpreter for the branch. I think the Justice Department and then OLC are to me constitutionally exercising a delegation from the President. He's the one who executes the laws, really. The Attorney General is helping him do that.

You're right. If the person of the Attorney General disagrees with the President and gets overruled and it's important, he should resign. But I don't think the Attorney General is constitutionally independent. He can't actually say, "I refuse to obey the President's orders and the Office of the Attorney General will refuse to interpret the law the way the President does." As a person he can leave, but I don't think the office could.

Kassop: But it's the institutional memory, essentially, of interpretations of Executive power.

Yoo: Well, yes, within the Justice Department, OLC really is the only office that exists to keep the precedents and traditions of defending Executive power from Congress alive. There are people in the office who have been there 30, 40—There was a guy I think who was in there 50 years when I was there. I think he was there under Eisenhower. They remember all these examples of conflicts that never make it into court, there's barely any written documentation. But yes, they're the ones who are supposed to remember all the places where Congress and the President have fought and the position that the Presidents in the past have taken.

There is this very conscious effort to maintain those positions so that you don't give anything up to Congress while you're there. OLC's job is to prevent that from happening.

Nelson: John, obviously you got known for some controversial memos you wrote, but I wonder if you could just tell us how a typical item of business that you were dealing with originates and then how would you handle it and over what period of time and who would be involved? Walk a typical—

Yoo: Suppose it was a request for advice from the White House on something not classified. It would come in the office to one of the deputies or to the head of the office. There is a whole record-keeping system to log that the request came in. Then the deputy and the head of the office would decide which of the four deputies would do the job, be responsible for walking through production, and then decide which career attorneys were to do it. The career attorneys would do all the research and draft the opinion, like a clerk would for a judge. It's very much a similar function; that's why a lot of people do it right after clerkships.

Then the deputy and the career attorney go back and forth on it, do the research. When it's done, the first deputy gives it to some other deputy who is not involved with it to read it over. When they're satisfied with it, they give it to the head of the office and then he does the same thing, or she does the same thing, the deputy and the line attorney. It's very much like a judge and their clerks. It just keeps going on and on until the Assistant Attorney General is satisfied with it and decides to sign it. Usually at that point, before he signs it, or she signs it, they give it to the client agency to look at to see if it answers the question that they're involved with or they want more things added to it or more questions have occurred to them in draft form before it's signed.

This process often takes years, as you can imagine. And often agencies, when they don't like the answer, will just say they don't want the opinion anymore. They'll decide not to do it. They'll say, "I don't want there to be a record that we wanted to do this if we decide not to in the end." There are a lot of OLC opinions that are never finished because of that process.

Just before the Assistant Attorney General signs it, he will notify the Deputy Attorney General's office and the Attorney General's office about it. Usually each one of those offices has someone

on their staff who covers OLC issues, is usually aware of the different opinions in the office, so he or she knows and can tell their bosses what's going on.

Nelson: If we read a memo of yours, how much of it is yours in terms of the drafting, the language?

Yoo: The initial draft is nothing of mine unless it was so classified I could only do it by myself, which happened in one case. Usually it is the product—A lot of the initial draft is still there because you're editing it. It varies from person to person. I would say Jay Bybee did not change the final versions that much; he would delete a lot of stuff or make line edits, but he rarely wrote up a text and added it. It just wasn't his style.

There's I think a lot more of that going on between the two deputies, like the second one who is reviewing the first one. There you see a lot of changes. The second deputy—I would do this other one—it would very much be like, "You need to add a section on this," or "You need to take this section out." So there you see much bigger changes going on.

By the time it got to Jay, he really wasn't interested in changing it all that much. I think part of that is that maybe after only six months on the job he's nominated to go on the court in Nevada. At that point he doesn't want to do anything that could get him in trouble for his confirmation. I don't think he's going to want a story on paper saying that the head of the office overrules consensus view of the civil servant. He's very loath to change anything. I think he was even interviewed for the job maybe in January, and he only showed up at the end of November. His nature is that way anyway, but to the extent he had any desire to really rewrite everything in his own hand, I think that really disappeared after he started being considered for a judgeship.

Riley: John, let me pull back on the clock a little bit. We don't have to be overly wedded to the chronology, but there are a couple of important things that we omitted. One was your getting settled in Washington. But I want to ask the prior question: You had a designee to head the office that didn't work out, and I'm wondering how that affects your transition into the position.

Yoo: It makes it difficult. The guy who originally was nominated couldn't get through security clearance.

Riley: Do you know why that was the case?

Yoo: Yes. I can't really say. It wasn't national security clearance; it was more like personal conduct.

Riley: OK.

Yoo: I'd say this. I think it was not something the Clinton administration would have cared about a lot. I used to see people they'd nominate for judgeships who did the same thing, but a Republican administration would care about. *[laughter]*

Riley: OK.

Yoo: It could be a very long list, I don't know, or a short list. I show up in July and they had picked somebody. Jay had been picked, but I don't know if he had been formally nominated by then. I was the first one to get there. There is a transition guy who is still there who is sort of keeping the place going.

Riley: Who's that?

Yoo: A guy named Sheldon Bradshaw. I think he becomes general counsel of the FDA [Food and Drug Administration] eventually.

Riley: That's not a career guy, that's—

Yoo: He came in with the transition team. He'd been there, basically the only Bush appointee, for six, seven months. On the other hand, the office wasn't doing that much in that time period. It does make things difficult, because it's not clear who's in authority. The other deputies hadn't even been chosen yet. It made it hard to figure out how to get things approved and even what positions to take at first. You don't want to do anything in the office that makes it difficult for the guy who is going to get confirmed, to get confirmed.

Riley: Right.

Yoo: That basically goes on until I guess late August. It's not until then when the first people get picked for the other political positions in the office. Also, just another example of why the office is seen as more important to the Presidential agenda, you'll notice that there is a high proportion of political appointees to career appointees that is well beyond almost any other—The SG's office also has that, but if you look at the criminal division, it might have two or three deputies who are political appointees and then hundreds and hundreds of career attorneys. To have a one to five ratio is extremely unusual. It shows how important that office is to the policy agenda of the administration.

Riley: How firm is the rest of the Justice Department around you at the time? This particular office is very much in a state of flux. Has Ashcroft—

Yoo: The other ones are a little farther along. In the criminal division, Mike Chertoff is already confirmed in office, the Deputy Attorney General is already confirmed in office. I think antitrust and civil—Because there had been a nominee who had been nominated and then withdrew, the office was delayed well beyond most of the other offices. We were one of the last ones. I think we might have been the actual last one that got fully staffed up.

Perry: In those first few months, what did the job seem like to you?

Yoo: It was pretty boring. There was really not enough work for the day. I spent some time on a Vacancies Act [Federal Vacancies Reform Act of 1998] issue, which always happens at the beginning of an administration: When can you appoint people who aren't confirmed yet, how long can they be in office, and what are they allowed to do? I remember working on the Presidential Executive order on federalism. I remember reviewing a treaty about marine mammals and thinking Antarctica and things like this. There was a case about a Russian on an American ship who might have killed an American, things that I'm really not that—I was

thinking I'd probably go back home after a year because I thought the job was pretty dull. It wasn't that the issues themselves were inherently dull, there just weren't many things coming in for work. I'm trying to think if there's anything else important. I met Addington, I think, during this period.

I guess Vice President Cheney was put as the head of the Energy Task Force [National Energy Policy Development Group], so he was first getting requests from the GAO [Government Accountability Office], which eventually sued him, if you remember. Although I didn't meet him in person, I was communicating with him by phone and fax on that case because he was asking about executive privilege. Since I was the only political appointee there, I was covering all the issues and knew executive privilege pretty well at that point. I remember giving him some advice on what letters Cheney should send back, although it's funny, since Cheney is not directly responsible to the President, Addington's view is he didn't actually have to follow what we said, unlike the other parts of the executive branch, because he's the Vice President.

The Vice President is independently elected. The theory is the President can remove anyone in office because they execute the laws under delegation from him, right? But the Vice President is the only other office that is actually elected, and he'd have to be impeached if they wanted to remove him. The President can't fire the Vice President, constitutionally. That's the actual motivating force that gets everyone to obey the President's interpretations of the Constitution in the executive branch. David was, I think, of the view that OLC opinions weren't necessarily binding on the Vice Presidency because the President couldn't remove him from office so he couldn't force him to do it the way he could the department, the Secretary of Defense.

I met Addington. I didn't think I was going to stay longer than a year probably, because I thought it wasn't enough work.

Riley: Did your wife come with you to Washington?

Yoo: She did at first. She is a journalist, so she is working at the Knight-Ridder paper in San José, but she is planning to come. She has got to stay a little longer, so I came first. She doesn't come until after September 11. She doesn't come until, I think, late October, early November.

Kassop: Which gives you a lot of time to work overtime.

Yoo: Yes. Actually, it was very good for personal life, given what happened, not getting home a lot those first few months.

Nelson: The legal theories that you developed about Presidential power, how did they square with the legal theories of Presidential power that OLC traditionally—

Yoo: Obviously there's a lot of agreement. There are some areas where OLC's views were beyond mine in terms of Presidential power, like with the funding power especially. My academic view is that Congress can do whatever it wants with the funding power. OLC had this view that if a rider tells you to do something that Congress could not constitutionally control itself, then the President could disobey the funding rider, which I didn't agree with. I always thought that if Congress said you have no funds to invade Normandy Beach, then you have no

funds to invade Normandy Beach. OLC's view was that Congress cannot use its funding power to achieve something it couldn't by direct legislation.

So if Congress can't pass a statute saying that, then it can't do it through funding. That one area—I think maybe in some areas, executive privilege, OLC's traditional positions were a little farther than mine, but in most—the foreign affairs, national security area—I thought we were pretty much well in agreement, particularly in war powers.

Nelson: It sounds like you worked with different career people on different issues?

Yoo: Yes, as part of that staffing process, it was up to the deputy and the head of the office which people—So there was one guy, a career guy who is still there, who is in charge of dividing national security from foreign affairs. National security was thought to be more intelligence, counterterrorism; foreign affairs is more like treaties and war powers. They had two different career guys of long standing: one guy did national security, and the other guy did foreign affairs. The foreign affairs guy is Robert Delahunty, who is now professor at St. Thomas and coauthor of mine on various things since then. He's the kind of guy who could remember what position the United States had taken with France over the *Alabama* during the Civil War, things like that. He really was like the storehouse of Presidential practice in foreign affairs. He made it his business just to learn it all.

The other guy is a fellow named Dan Koffsky, who was a guy who cleared all the covert actions. My level of clearance takes a long time, so I didn't get that clearance until maybe a week after September 11, because I'd just got there in July and I'm still pending.

Nelson: The career lawyers there, when they knew you were going to be the deputy for foreign—Did they read your stuff if they hadn't already read it?

Yoo: Oh yes. They knew who I was before I got there. I was the only academic who took the position they took on war powers. They knew who I was, but I had not met any of them before. I didn't know who any of them were. But yes, they definitely knew what my views were.

Riley: You're saying that your views were very much—

Yoo: Yes, I was just trying to describe the areas where I didn't think they aligned on foreign policy. The only areas were primarily funding and Congress. There were some people who would take the position that Congress can't take action that violates a treaty obligation, which was Hamilton's position during the [John] Jay Treaty. I don't have that view. I think Congress takes action that puts us in violation. They can, they're allowed to, but I think OLC's position would be still the executive branch can stop that from happening because he or she implements treaties and they're law of the land. There are some areas—That one didn't come up, I don't think, during my time there, but there are some—It did come up. There are some areas where OLC policies are more protective of Presidential power even than I would be, but other than those areas, I think there's just general agreement.

Nelson: So aside from you and maybe one or two others, the scholarly consensus on these issues was entirely divorced from the OLC understanding?

Yoo: Yes, and a lot of the writings would attack OLC opinions and practice. I was saying the attack on Walter Dellinger is a really good example of that. But yes, I think that's right. It's funny, the other academics who have that view are really—I think of them as Vietnam War-era people. The people who have written on the other side, more on the side I did, would be Eugene Rostow, people like that, Phil Bobbitt. They have that view. But their argument is purely functional. Their argument is essentially whatever the original understanding said, it's impossible today for Congress to have that kind of role in deciding on national security. It wasn't originalism. It wasn't constitutional text based. But on the war powers issue, I don't think there was any area of disagreement between what I thought and OLC.

Riley: Anything else in the pre-9/11 era that you want to ask?

Kassop: No.

[Thirty pages have been redacted.]