

**Dick Cheney, John Yoo, and COG on 9/11:  
A letter to readers of the *Journal of 9/11 Studies***

In 1993 I wrote a book, *Deep Politics and the Death of JFK*, in which I said at the outset I was not going to try to solve the mystery of JFK's murder but to examine the politics of it.

I wish to argue here for similar research into the politics of 9/11. For the political consequences of 9/11 have been toxic, regardless of how the towers fell or who was responsible. The unusual process of their implementation deserves close study, a study which I believe will cast more light on 9/11 itself.

I hope in this paper to show that Dick Cheney responded to 9/11 by using devious means to install a small cabal of lawyers – most notoriously John Yoo – who proceeded conspiratorially in the next weeks to exclude their superiors, while secretly authorizing measures ranging from warrantless surveillance and detention to torture.

Some of these were measures which Cheney and Rumsfeld had previously been preparing for almost two decades, as central figures in the secret agency planning for so-called Continuity of Government (COG). On 9/11, the 9/11 Report confirms, COG was implemented. As we shall see, Cheney promptly ordered the three top figures in the Justice Department out of Washington to a designated COG site buried deep underground.

This allowed Cheney's cabal to deal instead, starting that same afternoon, with John Yoo in the Justice Department command center. At that time John Yoo, a 34-year-old distinguished chiefly for his repeated defense of Cheney's eccentric views on presidential authority, had only been in the government for two months.

As a consequence, since 9/11 we have seen warrantless surveillance, suspension of habeas corpus, and the militarization of homeland security, on an unprecedented scale that is not just illegal but an erasure of rights specified in the U.S. constitution.<sup>1</sup>

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<sup>1</sup> There was also heightened surveillance of Americans as a consequence of Dallas, but far less obtrusively than what we have today.

Furthermore, the secrecy and speed of the manner in which our rights were drastically subverted is itself an affront to the ideals of America as an open society: one in which major changes to our political fabric are only made through authorized channels, and after debate.

### **The Background: Continuity of Government Planning**

The origin of many of these measures – both their content and their secret planning outside of channels – was the secret Continuity of Government (COG) planning that Rumsfeld and Cheney had been engaged in since 1982.

In the 1980s three secret COG provisions were roughly identified by Alfonso Chardy of the *Miami News* and Ross Gelbspan of the *Boston Globe*. According to Chardy in 1987,

the plans envisaged suspension of the Constitution, turning control of the government over to the Federal Emergency Management Agency [FEMA], emergency appointment of military commanders to run state and local governments and declaration of martial law during a national crisis.”<sup>2</sup>

Gelbspan added that North was also working with FEMA officials on

a secret contingency plan to surveil political dissenters and to arrange for the detention of hundreds of thousands of undocumented aliens in case of an unspecified national emergency.<sup>3</sup>

Between them, the two journalists thus pointed to the *content* of the surveillance, detention, and militarization measures which, after over a decade of further refinement, was finally implemented on 9/11.

They also indicated how secret, extra-constitutional, and unaccountable was the *process* of the COG planning. Chardy accurately referred to North’s network as “a virtual parallel government *outside* the traditional Cabinet departments and agencies almost from the day Reagan took office.”<sup>4</sup>

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<sup>2</sup>Alfonso Chardy, “Reagan Aides and the Secret Government,” *Miami Herald*, July 5, 1987, [http://bellaciao.org/en/article.php?id\\_article=9877](http://bellaciao.org/en/article.php?id_article=9877), emphasis added.

<sup>3</sup>Ross Gelbspan, *Break-Ins, Death Threats, and the FBI: The Covert War against the Central America Movement* (Boston: South End Press, 1991), 184.

<sup>4</sup>Chardy, “Reagan Aides and the Secret Government,” *Miami Herald*, July 5, 1987.

Four years later, in 1991, CNN revealed for the first time that North and FEMA were under a secret National Program Office (NPO) in charge of Continuity of Government (COG) planning, known in the Pentagon as “the Domsday Project.” It called the NPO a “shadow government . . . about which you know nothing.”<sup>5</sup> And in 2004 two authors, James Mann and James Bamford, wrote that in the 1980s two central figures guiding North in the Domsday planning, which Mann called “extralegal and extraconstitutional,” had been Donald Rumsfeld and Dick Cheney.<sup>6</sup>

The new details from Bamford and Mann about this multi-billion program were invaluable. But unfortunately both men believed, because of a very misleading story in the *New York Times*, that under Clinton “officials decided to abandon the program as an outdated legacy of the cold war.”<sup>7</sup>

Both men were wrong: all that had been abandoned was the original and completely honorable purpose of COG planning under Truman and Eisenhower – to deal with the catastrophe of an *atomic* attack. Under Reagan the planning, from the outset, had shifted to dealing with *any* emergency.<sup>8</sup> Not only did the planning by Rumsfeld and Cheney continue under Clinton, it was augmented.<sup>9</sup>

How very true, then, was Mann’s observation that

Cheney and Rumsfeld were, in a sense, a part of the permanent hidden national-security apparatus of the United States—inhabitants of a world in which Presidents come and go, but America keeps on fighting.<sup>10</sup>

<sup>5</sup> CNN Special Assignment, November 17, 1991. Cf. AP, “CNN reveals plans for ‘Domsday Government,’” *Racine Journal Times*, November 17, 1991, [http://journaltimes.com/news/local/cnn-reveals-plans-for-domsday-government/article\\_02c0bd0d-bdfd-5429-b1da-49e3ccc4970b.html](http://journaltimes.com/news/local/cnn-reveals-plans-for-domsday-government/article_02c0bd0d-bdfd-5429-b1da-49e3ccc4970b.html).

<sup>6</sup> James Bamford, *A Pretext for War: 9/11, Iraq, and the Abuse of America’s Intelligence Agencies* (New York: Doubleday, 2004), 74; cf. James Mann, *The Rise of the Vulcans: The History of Bush’s War Cabinet* (New York: Viking, 2004), 138–45; James Mann, “The Armageddon Plan,” *Atlantic*, March 2004, <http://www.theatlantic.com/magazine/archive/2004/03/the-armageddon-plan/302902/>.

<sup>7</sup> Mann, *The Rise of the Vulcans*, 144; citing Tim Weiner, “Pentagon Book for Domsday to Be Closed,” *New York Times*, April 18, 1994; cf. Bamford, *A Pretext for War*, 74. Cf. discussion in Peter Dale Scott, *The American Deep State* (Lanham, MD: Rowman & Littlefield, 2015), 32.

<sup>8</sup> One of Reagan’s last Executive Orders, 12676 of 18 November 1988, decreed that COG planning was not just to deal with “a nuclear war,” but for “any national security emergency” (Peter Dale Scott, *The Road to 9/11* [Berkeley, CA: University of California Press, 2007], 186). This merely confirmed six years of NPO practice from the time of its establishment by another Reagan Executive Order in September 1982.

<sup>9</sup> Scott, *The American Deep State*, 33. Cf. Peter Dale Scott, “Systemic Destabilization in Recent American History: 9/11, the JFK Assassination, and the Oklahoma City Bombing as a Strategy of Tension,” *The Asia-Pacific Journal: Japan Focus*, September 23, 2012, [http://japanfocus.org/-Peter\\_Dale-Scott/3835](http://japanfocus.org/-Peter_Dale-Scott/3835).

<sup>10</sup> Mann, *The Rise of the Vulcans*, 145.

This situation was particularly disturbing under Clinton, when Rumsfeld (and possibly Cheney) continued to plan for subordination of the constitution, even though at this time *neither man was in the government*.<sup>11</sup> Both men were now CEOs of large private corporations (as Rumsfeld had been since recruited in 1982 for the task).<sup>12</sup> And one of the planners told Andrew Cockburn that the Clinton administration had “no idea what was going on.”<sup>13</sup> (Such phenomena persuaded me to analyze 9/11 as a deep event, to be analyzed in the context of the American deep state.)<sup>14</sup>

Private corporation leaders had been brought into COG planning under Eisenhower, because recovery from a nuclear attack would have required a corporate as well as government response.<sup>15</sup> Ike could hardly have foreseen that under Reagan private people would begin to plan for the extralegal surveillance and detention of their fellow citizens, still less that these plans would finally be implemented by two of the central planners -- Rumsfeld and Cheney -- on September 11, 2001.

### **The Implementation of COG Measures on 9/11**

As the 9/11 Report confirms (pp. 38, 226), on 9/11 COG plans were indeed implemented, before the last plane had crashed in Pennsylvania. It was under the auspices of COG that Bush stayed out of Washington on that day, and other government leaders like Paul Wolfowitz were swiftly evacuated to COG’s Site R, inside a hollowed out mountain near Camp David.<sup>16</sup>

These emergency measures were soon followed by two White House Declarations of Emergency: Executive Order 13223 of September 14, 2001 (“Ordering the

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<sup>11</sup> Andrew Cockburn, *Rumsfeld: His Rise, Fall, and Catastrophic Legacy* (New York: Scribner, 2007), 88: “In earlier times the... ‘shadow government’ had [included] the political spectrum, Democrats and Republicans alike. But now, down in the bunkers, Rumsfeld found himself in politically congenial company, the players’ roster being filled almost exclusively with Republican hawks.” I have written in the past that Cheney was also there, but cannot now verify whether or not he was still part of COG planning.

<sup>12</sup> For five years in the 1990s Cheney was CEO of the Halliburton Company, an oil extraction firm with a direct stake in opening up Iraqi and other central Asian oilfields to American development.

<sup>13</sup> Cockburn, *Rumsfeld: His Rise, Fall, and Catastrophic Legacy*, 88; quoted in Scott, *Road to 9/11*, 187.

<sup>14</sup> Scott, *The American Deep State*; Mike Lofgren’s *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government* (New York: Viking, 2016)

<sup>15</sup> Bamford, *A Pretext for War*, 71; Matthew L. Conaty, “The Atomic Midwife: The Eisenhower Administration’s Continuity-of-Government Plans and the Legacy of ‘Constitutional Dictatorship,’” *Rutgers Law Review*, 62, no. 3 (Spring 2010), 7.

<sup>16</sup> Mann, *The Rise of the Vulcans*, 139. Cf. Robert J. Darling, *24 Hours Inside the President's Bunker* (iUniverse, 2010), 57. 67. Bush himself was directed on 9/11 to an underground COG site at Offutt Air Force Base, Nebraska (Bill Kelly, “Military insiders recall Bush’s 9/11 stop at Stratcom,” KVNO News, September 7, 2011, <http://www.kvnonews.com/2011/09/military-insiders-recall-bushs-911-stop-at-stratcom/>).

Ready Reserve of the Armed Forces to Active Duty”), and Executive Order 13224 of September 23, 2001 (“with respect to persons who commit, threaten to commit, or support terrorism”).<sup>17</sup>

There was much more to come.

Within hours of the attacks on the World Trade Center and the Pentagon on Sept. 11, 2001, Dick Cheney in effect took command of the national security operations of the federal government. Quickly and instinctively, he began to act in response to two longstanding beliefs: that the great dangers facing the United States justified almost any response, whether or not legal; and that the presidency needed vastly to enhance its authority, which had been unjustifiably and dangerously weakened in the post-Vietnam, post-Watergate years.<sup>18</sup>

James Mann has argued that COG implementation was the “hidden backdrop” to Cheney’s actions on 9/11, when he “urged President Bush to stay out of Washington,” and later removed himself to more than one “undisclosed location.”<sup>19</sup>

According to Jane Mayer, Cheney’s chief aide that day in revamping government was his long-time legal assistant David Addington (a veteran with Cheney of COG planning). All sources follow the *Washington Post* in asserting that Addington initially walked away when the order was given to vacate the White House, then was summoned back by Cheney.<sup>20</sup> Yet Mayer writes that “*Within minutes* of the September 11 terrorist attacks, Addington began to assert himself as the war on terror’s indispensable man.”<sup>21</sup>

## How Cheney’s Lawyers Subordinated US Law

According to Barton Gellman in the *Washington Post*,

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<sup>17</sup> This gave the president the power to confiscate without trial or warning the property of individuals providing funds to entities, such as charitable foundations, which were judged to be supporting terrorism. The executive order initially blocked property of twenty-seven designated terrorists. But the list has become enormous. By November 18, 2010, the list included eighty-seven pages just for the letter A. By August 2016 the letter A took 192 pages.

<sup>18</sup> Alan Brinkley, “Black Sites,” *New York Times*, August 3, 2008, [http://www.nytimes.com/2008/08/03/books/review/Brinkley-t.html?\\_r=0](http://www.nytimes.com/2008/08/03/books/review/Brinkley-t.html?_r=0).

<sup>19</sup> Mann, *The Rise of the Vulcans*, 145.

<sup>20</sup> Barton Gellman and Jo Becker, “A Different Understanding with the President,” *Washington Post*, June 24, 2007, [http://voices.washingtonpost.com/cheney/chapters/chapter\\_1/](http://voices.washingtonpost.com/cheney/chapters/chapter_1/)

<sup>21</sup> Jane Mayer, *The Dark Side: The Inside Story on How the War on Terror Turned into a War on American Ideals* (New York: Anchor, 2009), 49.

Before the day ended, Cheney's lawyer [Addington] joined forces with Timothy E. Flanigan, the deputy White House counsel, linked by secure video from the Situation Room. Flanigan patched in John C. Yoo at the Justice Department's fourth-floor command center. White House counsel Alberto R. Gonzales joined later.

Thus formed the core legal team that Cheney oversaw, directly and indirectly, after the terrorist attacks.<sup>22</sup>

In addition, Flanigan was in touch by about 10:30 AM with the fifth member of the War Council, William Haynes, Pentagon general counsel.<sup>23</sup> This War Council “explicitly excluded the State Department’s general counsel and other military and Justice Department lawyers who had historically been included in reviewing legal structures for combating terrorism.”<sup>24</sup>

In the next months this five-man team, who called themselves “the War Council,” issued secret directives, sometimes without notifying their nominal superiors, that continued to implement COG plans and up-end established constitutional restraints on executive power.

One of the first instances was to authorize the use of military force domestically, something that Congress, when passing the Authorization for Use of Military Force (AUMF) on September 14, had refused to do. Before passage, Republican Senate Minority leader Trent Lott delivered to his Democrat counterpart, Tom Daschle, a special request from White House Counsel Alberto Gonzalez. This was that the proposed language defining the area for military action be expanded, by adding the words “in the United States.” Daschle refused to give the president the power to round up US citizens in this country, and the AUMF passed unamended.<sup>25</sup>

On the lawbooks, that is. However,

Within a week, the Justice Department delivered a secret answer [submitted on September 21 by John Yoo] that would shock Daschle when he found out about it [three years later]. The memo argued that in times of national

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<sup>22</sup> Gellman and Becker, “A Different Understanding with the President,” *Washington Post*, June 24, 2007.

<sup>23</sup> Kurt Eichenwald, *500 Days: Secrets and Lies in the Terror Wars* [QQ: Touchstone, 2012], 35.

<sup>24</sup> Jeremy Scahill, *Dirty Wars: The World Is a Battlefield* (New York: Nation Books, 2013), 24.

<sup>25</sup> Mayer, *The Dark Side*, 44-45.

emergency, which had been declared since September 11, “If the president decided the threat justified deploying the military inside the country, the federal government could legally “raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed ....” .... In this and related memos, the Justice Department said that the executive branch could ignore both Fourth Amendment protections against illegitimate searches and, without court warrants, specific laws passed by Congress prohibiting wiretaps and other surreptitious surveillance.<sup>26</sup>

So what Cheney, Gonzalez, and Flanigan had failed to obtain from Congress, they got instead from their own small group.<sup>27</sup>

The War Council’s secret rulings were often kept hidden from other administration lawyers, as well as Congress. In October, for example, John Yoo, the young deputy at the Office of Legal Counsel in the Justice Department, drafted a memo, quickly approved by Cheney and Addington, that ruled that the NSA could surveil whomever it wished without an order from the Foreign Intelligence Surveillance Court (FISC).<sup>28</sup>

This memo granted the NSA a power which Michael Hayden had requested and already exercised. Yet many other administration lawyers were not consulted, including

the top lawyer for Condoleezza Rice’s National Security Council, John Bellinger III. In fact, Bellinger was not told about the Terrorist Surveillance Program at all. This was strange, because unlike Addington, who had no line authority over national security matters, Bellinger was the ranking lawyer in the White House on intelligence affairs, with statutory purview over the

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<sup>26</sup> Mayer, *The Dark Side*, 46; cf. Tim Golden, “Threats and Responses: Tough Justice; After Terror, a Secret Rewriting of Military Law, *New York Times*, October 24, 2004, [http://www.nytimes.com/2004/10/24/us/threats-and-responses-tough-justice-after-terror-a-secret-rewriting-of.html?\\_r=0](http://www.nytimes.com/2004/10/24/us/threats-and-responses-tough-justice-after-terror-a-secret-rewriting-of.html?_r=0) (“September 21, Yoo”). Jeremy Scahill also writes of a War Council opinion leading to a Bush presidential finding of September 17. This finding was used to create Greystone, a highly classified program outside of Congressional oversight that effectively “declared all covert [CIA] actions to be pre-authorized and legal” (Scahill, *Dirty Wars*, 24). Cf. Dana Priest and William M. Arkin, *Top Secret America: The Rise of the New American Security State* (New York: Little, Brown, 2011), 19-20 (“CIA”).

<sup>27</sup> Later Yoo would argue that “Congress not only did not forbid but actually invited warrantless domestic surveillance when it passed the Authorization for Use of Military Force (Barton Gellman, *Angler: The Cheney Vice Presidency* [New York: Penguin Press, 2008], 152).

<sup>28</sup> Mayer, *The Dark Side*, 69; Gellman, *Angler*, 141-43. After the warrantless surveillance program was revealed in 2005, Bush justified it, linking it to “terrorist threats to the continuity of our government” (David E. Sanger, “Bush Says He Ordered Domestic Spying,” *New York Times*, December 18, 2005, <http://www.nytimes.com/2005/12/18/politics/bush-says-he-ordered-domestic-spying.html>.)

subject.... Richard Shiffrin was also not informed about the domestic spying program, which was remarkable, because Shiffrin was the Pentagon lawyer in charge of supervising the legality of the NSA's programs.... Ashcroft's deputy attorney general, Larry Thompson, the second-ranking lawyer in the Department of Justice, was excluded... too.... This was phenomenal, given that he was John Yoo's boss.<sup>29</sup>

This cabal-like behavior by Cheney and the War Council – the team that would subsequently produce the notorious torture memos -- was repeated on other matters. In the decision to use military commissions to try the Guantanamo detainees, for example, those left out of the loop included Defense Secretary Powell, National Security Adviser Rice, Rice's lawyer John Bellinger III, and Michael Chertoff, head of the Justice Department's Criminal Division.

Attorney General Ashcroft had only learned of the military commission plan two days earlier, when he discovered to his outrage that John Yoo, his subordinate, had vouched for a confidential legal memorandum cutting the Justice Department and U.S. Courts out of the picture.<sup>30</sup>

It would be wrong to think that all of the post-9/11 changes can be attributed to the legal team of the War Council. According to Professor Shirley Anne Warshaw, in this period

Cheney jumped into action in his bunker beneath the East Wing to ensure continuity in government. He immediately began to create his shadow government by ordering one hundred mid-level executive officials to move to specially designated underground bunkers and stay there twenty-four hours a day. They would not be rotated out, he informed them, for ninety days.<sup>31</sup>

The *Washington Post* revealed this “shadow government” under Cheney in March

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<sup>29</sup> Mayer, *The Dark Side*, 68-70.

<sup>30</sup> Mayer, *The Dark Side*, 82. Cf. Tom Lasseter, “Secret Tactics Dictated Treatment of Detainees,” *Seattle Times*, June 18, 2008: “When military lawyers protested, the War Council shut them out. ‘We were absolutely marginalized,’ said Donald Guter, a rear admiral who served as the Navy’s judge advocate general from 2000 to 2002. ‘I think it was intentional, because so many military JAGs spoke up about the rule of law.’”

<sup>31</sup> Shirley Anne Warshaw, *The Co-Presidency of Bush and Cheney* (Stanford, CA: Stanford Politics and Policy, 2009), 164–65. Cf. Scott, *The American Deep State*, 34; Scott, *Road to 9/11*, 237; Gellman, *Angler*, 157: “Joseph Hagin, the deputy White House chief of operations, kept a rotating cadre of 70 to 150 senior managers from across the executive branch on twenty-four hour bunker duty in a hollowed-out mountain away from Washington.”



2002, and described it as still on-going.<sup>32</sup>

What this parallel government did for three or more months is not known. But I have noted elsewhere a number of other new COG measures, such as permanent detention centers and the militarization of homeland security, that date back to this post-9/11 period.<sup>33</sup>

### **How Cheney and Addington Used COG to Empower Yoo**

Given the speed and determination with which the War Council acted to rewrite U.S laws and procedures, one needs to look more closely at circumstances under which they sprang into action on the afternoon of 9/11. According to all mainstream accounts, the five members of the War Council were thrown together that day by accident. Addington spoke to Flanigan, the deputy White House counsel, because “Flanigan’s boss, Alberto Gonzalez, was stranded in Norfolk.”<sup>34</sup>

On 9/11 Findley (to quote the mainstream account by Barton Gellman), “found a young attorney named John C. Yoo.”<sup>35</sup> But this was not by accident. Yoo, the deputy assistant attorney general for the Office of Legal Counsel with two months of government experience, was presiding at the Justice command center. This was because attorney general Ashcroft and those directly under him (his deputy Larry Thompson, and his assistant David Ayres) had been ordered by the PEOC under COG rules to go elsewhere.<sup>36</sup>

(The Ashcroft team were not Cheney’s only targets on 9/11. On that day Cheney also evacuated to Site R the second and third in line to succeed to the presidency, House Speaker Dennis Hastert and Senate President Pro Tem Robert Byrd.<sup>37</sup> This was consistent with the COG priority of ensuring that the US Government was not

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<sup>32</sup> Barton Gellman and Susan Schmidt, “Shadow Government Is at Work in Secret,” *Washington Post*, March 1, 2002, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900891.html>.

<sup>33</sup> Scott, *The American Deep State*, 34-38.

<sup>34</sup> Gellman, *Angler*, 133.

<sup>35</sup> Gellman, *Angler*, 134.

<sup>36</sup> Attorney General Ashcroft had been airborne for most of the morning. On his belated return to Washington, he was told by Rice in the PEOC to join his deputy, Larry Thompson, and his assistant, David Ayres, who had already been sent out of Washington to a classified COG site. Because of traffic conditions, Ashcroft was ultimately redirected that afternoon to the FBI Crisis Management Center. See John Ashcroft, *Never Again: Securing America and Restoring Justice* (New York: Center Street, 2006). Yoo’s eventual boss at the OLC, Jay Bybee, had not yet been appointed. Bybee’s position, as assistant attorney general for the Office of Legal Counsel, required Congressional approval. His name had been submitted to Congress on September 4, 2011, one week before 9/11. He was confirmed by the Senate on October 23, and began to serve in November.

<sup>37</sup> Gellman, *Angler*, 156; Chris Simpson, on Democracy Now, NPR, March 22, 2002, <http://portland.indymedia.org/en/2002/03/8187.shtml> (“Site R”).

decapitated. And in the weeks after 9/11, when Site R became so busy under Cheney that substantial upgrades to its equipment had to be ordered by Andrew Card in the White House, someone from the line of succession was always there. However, *never once again* was that person either Hastert or Byrd.<sup>38</sup> This suggests that Hastert and Byrd may have also been banished to Site R on 9/11, and excluded from Site R thereafter, for political reasons.)

Cheney had compelling ideological reasons on 9/11 to decapitate the Justice Department on that day and leave Yoo in command. Both men shared the eccentric legal belief, repudiated by most Bush administration lawyers, that a president in times of emergency had almost unrestricted powers. Back in 1980 Cheney had advised incoming presidential chief of staff James Baker that it was important to get rid of the War Powers Act and restore the president's independent rights.<sup>39</sup> In his Iran-Contra Minority Report of 1987, Cheney declared his belief, drafted for him by Addington, that "the Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the laws."<sup>40</sup> Yoo was one of the few academics to share that opinion: "For years, [Yoo] had written articles for law reviews... arguing that in a time of war, the executive had a sweeping claim to act independently from the other branches of government."<sup>41</sup>

As in the COG planning of previous decades, the implementation of new measures under Cheney proceeded with what Barton Gellman called

near hermetic secrecy. Not only the conduct of policy but even the law itself, as Yoo and Addington and Flanigan rewrote it, was classified. The new legal framework was meant to be invisible, unreviewable – its very existence unknown by legislative or judicial actors who might fight back.<sup>42</sup>

Andrew Bacevich, reviewing *The Dark Side* for the *Washington Post*, characterized the behavior of the War Council as that of a small, secretive

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<sup>38</sup> Gellman, *Angler*, 157; citing interview with Norman Ornstein, senior counselor to the Continuity of Government Commission. Cf. Barton Gellman and Susan Schmidt, "Shadow Government Is at Work in Secret," *Washington Post*, March 1, 2002, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900891.html> ("substantial upgrades").

<sup>39</sup> Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2008), 43.

<sup>40</sup> Mayer, *The Dark Side*, 60.

<sup>41</sup> Kurt Eichenwald, *500 Days: Secrets and Lies in the Terror War*, 38. Yoo, unlike Cheney and Addington, used the common law term "prerogative" sparingly in his articles. Yet the effect of the War Council was to create, in Jane Mayer's words, "a doctrine of presidential prerogative" (Mayer, *The Dark Side*, 47).

<sup>42</sup> Gellman, *Angler*, 138.

“conspiracy... made up chiefly of lawyers contemptuous of the Constitution and the rule of law.”<sup>43</sup> I agree that the War Council’s plots to evade existing laws constituted conspiratorial behavior; and would argue further that Cheney’s role in creating the War Council on 9/11, by exiling the three top Justice officials who might have thwarted them, was also conspiratorial.<sup>44</sup>

But the key to the emergence of the ideological War Council cabal may go back to Cheney’s position as chief of the Bush transition team which selected John Yoo to be Office of Legal Counsel deputy assistant attorney general. Cheney was also responsible for locating Findley as a deputy legal counsel in the White House (a considerable demotion from his position a decade earlier as assistant attorney general for the OLC). According to Bernard Weiner,

Cheney began meddling with the all-important White House Office of Legal Counsel .... Cheney made sure Bush's lightweight *consiglieri* Alberto Gonzales didn't get the OLC post; instead, Cheney eased in a trusted aide, Tim Flanigan. With Flanigan in the White House under the influence of Cheney and David Addington, .... there was no real countervailing power in the Administration's legal departments to stop the reckless policies on torture, violation of habeas corpus, extraordinary rendition and so on.<sup>45</sup>

Other authors have raised questions about the absence from Washington, at the time of the 9/11 attacks, of such leaders as Defense Secretary Powell (in Peru), Joint Chiefs of Staff Chairman Henry Shelton (airborne *en route* to Europe), Attorney General Ashcroft (*en route* to Milwaukee), presidential counsel Alberto Gonzalez (in Norfolk, Va.), and others.<sup>46</sup>

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<sup>43</sup> Andrew Bacevich, “Collateral Damage,” *Washington Post*, July 13, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/11/ST2008071101354.html>.

<sup>44</sup> When the warrantless Terrorist Surveillance Program (TSP) came up for renewal in March 2004, Ashcroft, supported by his new deputy James Comey and his new OLC Chief Jack Goldsmith, refused to approve it. This led to a notorious confrontation in Ashcroft’s hospital bedroom, where Gonzalez and Andrew Card arrived from the White House with a renewal order for Ashcroft to sign. Ashcroft, who was under intensive care after surgery for gallstone pancreatitis, “lifted his head off the pillows and delivered a strong denunciation of the TSP’s legal framework”. His temporary replacement, deputy attorney general Comey, refused to sign. In the room Ashcroft and Comey were supported by Goldsmith and FBI Director Robert Mueller, both of whom Comey had summoned urgently to join him at the hospital after “a frantic call from Ashcroft’s wife” (Mayer, *The Dark Side*, 289-91; cf. Gellman, *Angler*, 302-05).

<sup>45</sup> Bernard Weiner: “Review of Barton Gellman's *Angler: The Cheney Vice Presidency*,” HistoryNewsNetwork, May 9, 2009, <http://historynewsnetwork.org/blog/6666>.

<sup>46</sup> E.g. Paul Thompson, *The Terror Timeline: Year by Year, Day by Day, Minute by Minute: A Comprehensive Chronicle of the Road to 9/11--and America's Response* (New York: HarperCollins, 2004), 364.

I am not in this article suggesting that all these absences were pre-planned as part of a larger 9/11 conspiracy.<sup>47</sup> In contrast, the order from the PEOC after the attacks to exile Ashcroft, Thompson, and Ayres to a COG website – thus putting Yoo in a command position – falls into a quite different category. If as I believe Cheney made this order with Yoo in mind, it would indicate only that Cheney's behavior was in response to a planned terrorist attack, not as part of that attack plan itself.<sup>48</sup>

It is a mark of how much our knowledge of 9/11 has evolved that in Paul Thompson's *The Terror Timeline* (2004), once the indispensable bible of 9/11 researchers, none of the five War Council members – Addington, Gonzalez, Flanigan, Yoo, and Haynes – are mentioned. Unquestionably the questions of who plotted the plane attacks, who directed the planes into their targets, who caused the three WTC towers to fall, continue to be of great historical interest.<sup>49</sup>

But the greatest plot of all – to subordinate the U.S. constitution to new procedures dating back to COG planning in the 1980s – has created an on-going emergency under which we still live. To understand this plot, in order to reverse its effects, may be a still more urgent research task.

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<sup>47</sup> Some have used these absences to suggest that the "state" itself planned 9/11, a simplistic notion I have consistently opposed.

<sup>48</sup> I believe that Cheney and Addington did indeed have a pre-planned agenda, dating from before 9/11, for response to the next terrorist attack; and that these plans, as I have suggested elsewhere, grew out of their years of secret planning for COG. But to say this does not imply that Cheney and Addington were involved in the attack itself. Some researchers believe that the fourth hijacked plane which crashed in Pennsylvania may have crashed because it had been shot down on Cheney's orders, a gruesome possibility which would however indicate that Cheney on that day was dealing with a dangerous enemy not under his control. See e.g. Mark H. Gaffney, *Black 9/11: Money, Motive and Technology* (Walterville, OR: Trine Day, 2012), 175-202.

<sup>49</sup> I have suggested elsewhere that these may be separable issues, attributable to separate plots piggy-backed on other plots (Scott, *The American Deep State*, 253n58).