



Written by [Thomas R. Eddlem](#) on July 17, 2009

John Yoo: President Can Ignore Law

A [report](#) by five intelligence and Justice Department inspectors general concluded that Yoo's legal memoranda, which claimed to confer legality on the eavesdropping programs, did "not accurately describe the scope of these activities," resulting in legally "insufficient" memoranda and "presenting a serious impediment to recertification of the program as to form and legality." At issue is the "President's Surveillance Program," which involves warrantless telephone tapping of international telephone calls, Internet traffic, and domestic telephone "meta-data," and perhaps "other" domestic intelligence surveillance.



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Yoo was also the Justice Department Assistant Attorney General who "justified" the torture of detainees by virtually defining torture out of legal existence in [pseudo-legal memoranda](#).

The [Unclassified Report on the President's Surveillance Program](#) was released on July 10, so Yoo penned a July 16 [op-ed for the Wall Street Journal](#) where he rails against the requirement that the president follow the law. "It is absurd to think that a law like FISA [Foreign Intelligence Surveillance Act] should restrict live military operations against potential attacks on the United States," he wrote.

The money quote copied/pasted into every news wire service story about Yoo's column is: "The best way to find an al Qaeda operative is to look at all email, text and phone traffic between Afghanistan and Pakistan and the U.S. This might involve the filtering of innocent traffic, just as roadblocks and airport screenings do." The *President's Surveillance Program* report said otherwise, terming the successes in the multibillion dollar program dubious at best.

But the real issue behind Yoo's argument is that the president is not required to follow the law. "In FISA, President Bush and his advisers faced an obsolete law not written with live war with an international terrorist organization in mind," he [wrote](#) in the *Wall Street Journal*. According to the *President's Surveillance Program* report, Yoo had [argued](#) that "we do not believe that Congress may restrict the President's inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack."

In Yoo's *Wall Street Journal* [column](#), one can witness the sloppy scholarship that was used to justify that unlimited presidential power. Yoo quotes Alexander Hamilton in *The Federalist*, #23, thusly:

The power to protect the nation, said Alexander Hamilton in the *Federalist*, "ought to exist without limitation," because "it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them." To limit the president's constitutional power to protect the nation from foreign threats is simply foolhardy.



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And Yoo accurately copied/pasted the quote from *The Federalist*. But he obviously failed to read the context for what he quoted, which is [this](#):

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation.

The problem with Yoo's scholarship is that when Hamilton wrote about powers in the federal government under the U.S. Constitution that exist "without limitation," Hamilton did not list warrantless searches as one of those powers and he did not list any presidential powers. [Article I, Section 8 of the U.S. Constitution](#) gives all of the powers Hamilton enumerated to Congress, rather than to the president:

The Congress shall have Power To ... provide for the common Defense ...

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces...

This is a clear reference that any first-year law student would have been able to pick out easily, but somehow Yoo managed to mix it up. If he hadn't also been the person responsible for "justifying" torture, he'd be an appropriate object of pity for making such a rank amateur mistake in such a public venue. Yoo argued in the *Wall Street Journal* article that "Our Constitution created a presidency whose function is to protect the nation from attack." Yet all one needs to do is go over the powers in the Constitution to find that Congress is clearly the body entrusted with keeping the nation secure.

In [The Federalist, #69](#), Alexander Hamilton wrote that the president's "authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."

In sum, Hamilton is arguing that the Congress makes all the rules, and the president's constitutional role is to follow those rules. The rules Congress makes are called "laws," the same laws that Yoo says the President should ignore.

The Founding Fathers fought against an executive with unlimited powers, and in *The Federalist* Hamilton, James Madison and John Jay argued that the Constitution had limited the executive branch severely. In [The Federalist, #48](#), James Madison rejected the notion entirely that the president's powers would be unlimited. "In a representative republic," Madison stressed, "the executive magistracy is carefully limited; both in the extent and the duration of its power." In a dictatorship, Madison essentially argued, the executive branch dominates and has unlimited power. In a free republic, however, the legislative branch is dominant.



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Yoo's [fall-back argument](#) is that other presidents have violated the U.S. Constitution's [Fourth Amendment](#) and laws passed by Congress and, therefore, it should be okay for Bush to have done the same:

"FDR did not hesitate long over a 1937 Supreme Court opinion (*United States v. Nardone*) interpreting federal law to prohibit electronic surveillance without a warrant. "It is too late to do anything about it after sabotage, assassinations and 'fifth column' activities are completed," he wrote in a secret 1940 memo authorizing the wire tapping. Indeed, he continued to authorize the surveillance even after Congress rejected proposals from his attorney general, Robert Jackson, to authorize national security wiretapping without a warrant."

This is not an argument of law, of course. It's nothing more than raw politics separated from the law and the Constitution.

But it's also an argument that current President Barack Obama has embraced. President Obama has kept the same surveillance programs open and active, and like President Bush has used Justice Department attorneys to block any attempts to interrupt the programs through the courts

Last year, Congress banned citizens from suing telecommunications companies for allowing surveillance of their phone calls and Internet traffic, but [an ongoing lawsuit](#) in the San Francisco District Federal Court is suing the U.S. government directly in the case of [Jewel v. NSA](#). Obama's [Justice Department lawyers argue](#) that the surveillance program must continue, just as John Yoo did. And just as the Bush administration argued, they can't tell judges about the programs because of the constitutionally non-existent "state secrets" privilege. Obama lawyers argue that the case can't go forward in the court because "at every stage, litigation plaintiffs' claims would require or risk the disclosure of information that is properly subject to the state secrets privilege and related statutory privileges."

Cindy Cohn of the San Francisco-based Electronic Frontier Foundation, [according to the Associated Press](#), told the judge in the case: "The government is arguing that the president gets to decide whether the surveillance is legal. We think the courts should decide."

That would clearly be a lot better than the president deciding. But it would be better still for the plain and unequivocal language of the [Fourth Amendment to the U.S. Constitution](#) to decide that issue.



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