

## The Atlantic

### A Debate With John Yoo, Who Misunderstands the Constitution

By Conor Friedersdorf

*The Bush-administration lawyer and advocate of virtually unlimited executive power in war dismisses as "simpleminded" concerns he once shared*

John Yoo is the Bush-administration lawyer best known for his expansive view of what the president is empowered to do in wartime (he thinks, for example, that crushing the testicles of an innocent child might be legal, [depending on the circumstances](#)). On *Ricochet*, an enjoyable right-leaning forum for conversation, we occasionally cross paths. And he has just [responded](#) to my argument that Tea Partiers are typically inconsistent in their embrace of "constitutional conservatism."

Put simply, I think Tea Partiers are strict constructionists when it comes to domestic affairs, but ready to concede extreme powers to the executive branch so long as it's in the name of fighting terrorism. (Or the War on Drugs. Or gangs. Or mosques near Ground Zero.) Here's the short excerpt from [my piece](#) that Prof. Yoo was read by the capable host of a *Ricochet* podcast:

Establishment conservatives and Tea Partiers alike are more likely than not to defend Dick Cheney, David Addington, the Patriot Act, the indefinite detention of American citizens, stripping the judiciary of its power, presidential assassinations of American citizens, and all the rest. Many of these people claim to be constitutional conservatives, but are ardent about that disposition only in domestic affairs. If national security, police powers, or foreign affairs are implicated, they are constitutional conservatives in name only, blind to executive branch excesses corrosive to individual liberty and often even to the constitution itself.

Said the host: "What do you say to a guy like Conor who says, 'You can't have it both ways. Unchecked power is unchecked power. It's going to erode individual freedom.'"

John Yoo's response:

Well I think he suffers from the same fallacy that Ron Paul suffers from, which is, well, because you have to have a limited executive in domestic affairs, that means you have to have an identically limited executive in foreign affairs. And I think that's just simplemindedly wrong, because if you look at the Constitution ... the executive power in foreign affairs is broader, it's just a question of how much broader than it is in domestic affairs. One could go through a lot of this. You could look at the text of the Constitution. But to me the most important thing is if you go back and look at the Federalist papers. And the reason that the Framers put the presidency into the Constitution to start with, it was because the presidency should be there to respond quickly and decisively and speedily to unforeseen circumstances, and they would say clearly, the area where we expect this to happen most would be in foreign affairs.

This is a strange way to frame the disagreement. Is anyone arguing that the president's foreign and domestic powers need to be "identically" expansive or limited? How would

one even compare vetoing legislation versus executing laws versus being the commander in chief? Perhaps a unit of presidential power called the Yoo could be created to make comparisons?

My concern isn't whether or not foreign affairs confers a disproportionate number of Yoos on the president. It is that some conservatives are happy to ignore *specific limitations the Constitution itself imposes* on the presidency. The Constitution gives to **the legislative branch** the power "to declare war," the power "to raise and support armies," the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Anticipating the problem of U.S. citizens joining up with enemies of the nation, the Constitution defines treason and lays out the specific protocol through which American citizens can be found guilty of it.

And the Constitution's larger logic isn't just to divvy up who does what: it is to check and balance each branch. Despite that fact, Yoo derives his expansive view of a virtually unchecked executive in war from the following passage: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." In this way, he is much like the liberals, routinely denounced by "constitutional conservatives," who find the commerce clause permits most anything, and that the Constitution contains a right to privacy that covers abortion, but not smoking marijuana cigarettes in one's home, or selling one's kidney, or not buying health insurance, which requires giving private corporations a detailed account of one's medical history. They too cite precedent and practical need in an attempt to justify their position. Unlike the Tea Party, they don't claim to being strict constructionists, originalists, or "constitutional conservatives." They argue that the Constitution is a living, breathing document. "Constitutional conservatives" ridicule them for it, but don't ridicule Yoo for stretching the document as far.

The Constitution also limits every branch of the federal government. For example, the Bill of Rights recognizes certain specific rights that every American possesses. Most relevant are these:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
- The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

When Yoo says that "the reason that the Framers put the presidency into the Constitution to start with, it was because the presidency should be there to respond quickly and decisively and speedily to unforeseen circumstances," he acts as if that somehow magically disappears all the actual checks on the executive branch, whether imposed by other branches or the Bill of Rights.

And practically speaking, there are plenty of instances wherein President Bush and President Obama have behaved in a manner I regard as unconstitutional when speed and decisiveness weren't factors. To cite a recent example that troubles only a small subset of Tea Partiers, Obama had time to ask Congress for a declaration of war in Libya. He didn't. And Yoo congratulated him on how he handled the conflict. If only Yoo would narrow his position by asserting that absent the need for speed the executive is less empowered! Of course, many of the Framers didn't even anticipate that the United States would maintain a standing army. The idea of ordering one into battle on the other side of the earth, and having to do so at a moment's notice in the manner of a 3 a.m. phone call, would be completely foreign to them for understandable reasons. Also foreign would be the notion of a perpetual war on terrorism without a clearly defined enemy, with the whole world as a battlefield and no foreseeable end in sight.

Yoo goes on to say this:

Putting it differently, if you wanted to have the kind of Constitution that Ron Paul would have or this fellow Conor would have, you wouldn't even need to put a president in the Constitution. You could just have Congress create administrative agencies and representatives to carry out their laws. This is what the continental Congress did before the Constitution, and it's actually the way that most countries in Western Europe are, parliamentary government where there is no division between the executive and the legislative branches.

In fact, the sort of Constitution that I want -- indeed, the sort I contend that we have -- very much requires a president. He or she is necessary to check and balance the legislative and judicial branches, to act as commander in chief of the Armed Forces, to make treaties, to give Congress information about the State of the Union, to oversee executive departments, and to sign or veto legislation. It is strange that even here the need for separation of powers doesn't occur to Yoo.

Stranger still is that he wasn't always so sanguine about unchecked executive power, even in matters of war. During the 1990s, Yoo excoriated President Clinton for exercising too much executive power. We know this due to a talk he gave at the Cato Institute titled "The Imperial President Abroad: The Rule of Law in the Wake of Clinton." Yoo said that "in order to achieve their foreign policy goals, the Clinton administration has ... undermined principles of democratic accountability that executive branches have agreed upon" going back to the Nixon years.

He continued:

The Clinton administration has displayed a fundamental disrespect for the rule of law. Not in the sense that they don't make legal arguments to defend their positions, but the legal arguments are so outrageous, they're so incredible, that they actually show, I think, a disrespect for the idea of law, by showing how utterly manipulable it is...

I think one of the things that the rule of law demands is that people be consistent, and that institutions be consistent in their legal positions. And I think the Clinton administration, as I'll discuss in a moment, has been wildly inconsistent. It has gone to the point of disavowing previous executive branch opinions, and when it does things that it finds so inconvenient legally that it overturns too much law, it just doesn't say anything at all, and goes ahead and does what it intends to do anyway.

The example Yoo gave of Clinton's lawlessness was his decision to wage the war in Kosovo without getting congressional approval, a violation of the War Powers Resolution. As he put it back then:

The administration has disavowed previous opinions, has contradicted itself and has undermined the checks and balances of our government. The primary example here is Kosovo but Kosovo is not the only example. Kosovo was only the latest in a long string of military interventions abroad. There was Bosnia, Sudan, Afghanistan, Haiti, Somalia. In fact, this administration has been one of the ones that most easily goes for the gun in its foreign affairs despite all of its efforts the claim to be interested in maintaining international stability and peace.

But Kosovo is a good example. Kosovo, as in all these other interventions, Congress never gave its approval for the intervention. Not only that, but Kosovo was the first time since the powers of the War Powers Resolution where the president actually violated the terms of the War Powers Resolution. Now previous presidents had never admitted that the War Powers Resolution was constitutional. But they had always kept within its terms. The War Powers Resolution, for example, requires that any deployment of force past 60 days abroad has to be approved by Congress. All the presidents have either gotten Congressional approval or had withdrawn the forces within 60 days.

Yoo is entitled to change his mind. But it's a little much for him to belittle as obviously false and "simplemindedly wrong" criticisms quite similar to the ones he himself used before being put in a position where his bosses benefited from a more expansive view of executive power. It is, furthermore, grating for Yoo to call those whose views depart from his "simpleminded" given that even the Department of Justice superior who saved him from being found to have violated professional ethics [proclaimed](#), "I fear that John

Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, view of executive power while speaking for an institutional client."

I acknowledge, of course, that the Constitutional law surrounding executive power is contested, even among lawyers with less extreme views and better peer reviews of their work than Yoo. What I urge even someone of his Constitutional opinions to remember is that even if our governing document did permit Obama all the powers Yoo thinks it does, that still wouldn't make their exercise prudent. Legal or not, it isn't difficult to see the potential for abuse in an endless war where the battlefield is everywhere on earth, the enemy is whoever the president says it is, and it never ends because someone else could always turn terrorist and blow something up.

Americans are free to favor that sort of war. But I take exception when they also claim to be staunch advocates of limited government who mistrust federal power and fear losing our freedoms to tyrannical leaders. Had King George himself been able to exercise all the powers that Obama claims, the original Tea Partiers would've been Predator droned to death before they left Boston harbor.