

# THAT'S WHY THEY CALL IT "DOMESTIC" SURVEILLANCE

One of my favorite parts in the EFF brief arguing that the retroactive immunity passed by Congress last year is unconstitutional is their response to the telecom brief's claim that the President has inherent authority over foreign affairs, and so doesn't need specific details regarding which telecoms should get immunity for having broken the law on President Bush's orders.

EFF points out that, if this were just about foreign affairs, we wouldn't be here.

Nor can the standardless delegation of section 802 be justified, as the carriers suggest (Carriers' Br. at 3-6), by reference to cases involving the President's exercise of inherent constitutional power over foreign relations with other nations or his inherent power to regulate and control the military forces. First, despite the efforts of the government and the carriers to blur the difference, the President's inherent powers over foreign relations and the military do not extend to the warrantless dragnet electronic surveillance and interception within the United States of the domestic communications of millions of American citizens who have no connection to any foreign power. The President has no inherent constitutional authority to conduct such activities, as this Court has held, *Hepting v. AT&T Corp.*, 439 F. Supp.2d 974, 1006 (N.D. Cal. 2006); see also *In re Nat'l Security Agency Telecom. Records Litig.*, 564 F. Supp.2d 1109, 1121 (N.D. Cal. 2008), nor to order the courts to terminate litigation challenging such activities.

This is about domestic surveillance, not foreign intelligence, dummies.

Now, we know that the Bush Administration did, at one point, claim its inherent authority tied to foreign affairs extends right into the apartment buildings of average Americans.

The memorandum, which was directed to White House Counsel Alberto Gonzales and Defense Department General Counsel William J. Haynes, addresses whether the president has constitutional or statutory authority to use military force inside the United States in terrorism-related situations and, if so, whether such domestic military operations would be barred by either the Fourth Amendment or the federal Posse Comitatus statute. Examples of the type of force considered for purposes of the analysis include, but are not limited to: (1) destroying civilian aircraft that are believed to have been hijacked; (2) deploying troops to control traffic in and out of a major American city; (3) seizing or attacking civilian property, such as apartment buildings, office complexes, or ships, believed to contain terrorism suspects; and, (4) **using military-level eavesdropping and surveillance technology on domestic targets.**

Mr. Yoo and Mr. Delahunty concluded that both Article II of the Constitution and the 9/11 use of force resolution would authorize these types of domestic military operations (even though Congress had expressly rejected language proposed by the Administration for the AUMF that would have authorized domestic military operations).<sup>292</sup> The memorandum also contains extended discussion of a hypothetical example which posits that a domestic military commander has received information, not rising to the level of

probable cause, suggesting that a terrorist has hidden inside an apartment building and may possess weapons of mass destruction. According to the memorandum, not only does the Constitution permit the commander to seize the building, detain everyone found inside, and then interrogate them – all without obtaining any sort of warrant – but information gathered by military commanders in this way could be used for criminal prosecution purposes as long as the primary reason for the seizure was the military fight against terrorism and not law enforcement. This memorandum was referenced in a subsequent OLC memorandum for the legal conclusion “that the Fourth Amendment had no application to domestic military operations.”<sup>293</sup> [my emphasis]

But this particular opinion stands out, even among John Yoo’s other crappy opinions, for its sheer bogosity. The Obama Administration really doesn’t want to rely on that crappery (indeed, the Obama Administration brief was more careful to claim the Executive had certain powers over foreign affairs **and** national security).

And ultimately, so long as we’re discussing lawsuits taken by American citizens against telecoms for illegally wiretapping them in a domestic context, the inherent authority argument rests on really shaky ground.