THE OLC OPINION ELIMINATING THE 4TH AMENDMENT (AND "JUSTIFYING" THE WARRANTLESS WIRETAP PROGRAM)

Christy linked to HJC's report on the Imperial Presidency earlier.

I'll have a lot more to say about it. But for the moment I wanted to point to details it includes on the October 23, 2001 OLC opinion eliminating the 4th Amendment we've been looking for (this is the memo cited in Yoo's Torture Memo).

On page 74 it describes the memo:

> On October 23, 2001, Deputy Assistant Attorney General John Yoo and Special Counsel Robert Delahunty in the Department of Justice's Office of Legal Counsel (OLC) prepared a memorandum entitled: "Authority for Use of Military Force to Combat Terrorist Activities Within the United States."291 This unclassified memorandum suggests broad power of the president as Commander in Chief to use military force inside the United States, contemplating even seizure and detention of United States citizens (or lawfully admitted aliens) in some circumstances. As such, the memorandum – though it does not squarely address detention policy – is consistent with the September 25, 2001, War Powers Memorandum which claimed for the president domestic war powers, anticipates the assertions of presidential power in the domestic detention context just a few months later, and anticipates the November 2001

> conclusion that the president has the power to subject United States citizens to military commissions.
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> 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 barredby 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**.
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> 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).292 **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 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."293 [my emphasis]

Then another description appears in footnote 1577:

> Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense ("DOD"), from John C. Yoo, Deputy Assistant Attorney General, OLC, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23,2001). — Committee staff have reviewed this unclassified memorandum, which contains extraordinary assertions of executive power and appears deeply flawed in its legal analysis. The memo relies on odd precedents, such as a 1933 decision of the New Mexico supreme court, while unhelpful precedents of seemingly greater weight — such as those discussing legal principles developed during the Civil War era involving non-battlefield actions — are dismissed in footnotes. **The memo focuses on a startling hypothetical example involving a U.S. military commander seizing an apartment building in a major American city and detaining and interrogating every person found inside**. The

> Department has claimed that this memo does not reflect current OLC thinking, but it is not clear if it has been formally withdrawn or revised. There is no excuse, moreover, for the Administration's refusal to make this memorandum public.[my emphasis]

I think the emphasis on physical search here is a bit of a red herring. Check out how that hypothetical scenario reads when you replace "apartment building" with "email server."

> The memorandum also contains extended discussion of a hypothetical example which posits that the NSA military commander has received information, not rising to the level of probable cause, suggesting that a terrorist has hidden messages inside an email server and which may possess information about weapons of mass destruction. According to the memorandum, not only does the Constitution permit the commander to seize the circuits, collect all the emails found inside, and then read them – all without obtaining any sort of warrant – but information gathered by military commanders in this way could used for criminal prosecution purposes as long as the primary reason for the seizure was the military fight against terrorism and not law enforcement.

We know, after all, that this opinion was included in those Stephen Bradbury said had formed the basis for the warrantless wiretap program, so we know BushCo used this logic when designing its warrantless wiretap program.

Call me crazy, but I'm betting money that this little exercise in abolishing the Fourth Amendment is precisely the logic the Administration used for collecting and reading all the telecom signals in this country. It "justifies" unwarranted searches **without**

probable cause, the detention of everyone residing in a particular space whether or not they have a demonstrated tie to the alleged terrorist, and it claims you can use information gathered from this warrantless search for criminal prosecution. That is—it "justifies" everything that is unjustifiable in the warrantless wiretap program.

I’m betting equal money that this is the stuff that made Jim Comey’s head pop off when he learned about it in 2003 and 2004.