

ABOUT THOSE MISSING OLC OPINIONS

(Note: I'm scheduled to be on Mark Levine's Inside Scoop today at 5PM ET. You can listen in [here](#).)

Okay okay already. Here's your damn missing OLC opinion post.

As a number of you have pointed out, ProPublica did a very cool database of all the OLC opinions on executive power, torture, and warrantless wiretapping that we know of. The database collects in one place, in sortable form, the opinions that track Bush's abuse of power.

I had done a timeline mapping the warrantless wiretap opinions to known events associated with Bush's illegal program (though it's not sortable like the ProPublica one). And don't forget that John Conyers gave us a very detailed description of that opinion eliminating the 4th Amendment.

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).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 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.”²⁹³ [my emphasis]

I had not, however, closely reviewed the ACLU’s list of torture opinions (which is what ProPublica based this on—and don’t forget ACLU has gotten badly stung in the economic crash and could use some love).

The most intriguing of those opinions is this one:

8/1/02 Jay S. Bybee, Assistant Attorney General, OLC, Determines whether a specific interrogation was torture

Remember, John Ascroft has all but admitted that they started tortuing Abu Zubaydah before the August 1, 2002 Bybee/Yoo memo authorizing waterboarding was completed. I guess while they were troubling Bybee and Yoo, they got them to retroactively declare the torture of Abu Zubaydah not torture.

Curiously, though, they're still unwillingly to charge Abu Zubaydah and let him speak publicly. I guess that particular memo presumably retroactively authorizing torture isn't all that sound.