

JOHN YOO'S WRESTLING MATCH WITH THE FIRST AMENDMENT

Among his other specious attempts at self defense in this column, John Yoo claims,

The government faced another fundamental question, which we addressed in our memo. Does the Fourth Amendment's requirement of a search warrant based on probable cause regulate the use of the military against terrorists on our soil. In portraying our answer, the media has quoted a single out-of-context sentence from our analysis: "First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully."

This line deliberately misrepresents the memo. The sentence only summarized a 1931 holding of the Supreme Court in the case of *Near v. Minnesota* concerning press freedom: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right." The Court continued: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Our memo had nothing to do with the First Amendment.

Pot, Kettle

Understand, one of Yoo's central strategies in this memo is to strip the 2001 AUMF out of the

context in which Congress specifically refused to authorize the use of "appropriate force" in the United States. Stripped from that context, Yoo claims in the memo that the AUMF explicitly allows for the "domestic use of force."

Section 2 [of the AUMF] authorizes the use of "all necessary and appropriate force" against the designated nations, organizations or person. Further, Congress declares that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." ... This broad statement reinforces the War Powers Resolution's acknowledgment of the President's constitutional powers in a state of national emergency. Like the War Powers Resolution, [the AUMF] does not limit its authorization and recognition of executive power to the use of force abroad. Indeed, [the AUMF] contemplates that the domestic use of force may well be necessary and appropriate. For example, [the AUMF's] findings state that the September 11 attacks "render it both necessary and appropriate that the United States ... protect United States citizens both at home and abroad." (emphasis Yoo's).

By focusing on a "single out-of-context sentence," Yoo claims Congress authorized something it specifically refused to do—authorize "all necessary and appropriate force in the United States and against those nations, organizations or persons [the president] determines planned, authorized, committed or aided" 9/11.

And, as Mary explains, even Yoo's use of *Near v. Minnesota* is an example of Yoo stripping legal language out of context.

From a legal standpoint, the best he can pitch is *Near v. Minnesota*. It is at

this point that some first year law student should tutor Yoo on the difference between *dicta* and holdings. When courts ramble on like me about how they might hold on things that might be or could be, but aren't the case in front of them, so they aren't really making a ruling on them, that's "dicta"

Near v. Minnesota is what is called a "prior restraints" case. It was about a statute that made certain kinds of things illegal to publish – operating to foreclose the conversation before it starts.

The Supreme Court actually struck DOWN the Minnesota statute (and the case was used as precedent for the Sup Ct refusing to engage in prior restraint for the publication of the Pentagon papers). That was the actual "holding" in *Near* – that state government could not, by statute, engage in prior restraint of speech.

With that context, which Yoo doesn't provide in his piece, he then wrings his hands over the fact that the quote from his memo, "*First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully*"

He is indignant (and really bad at being insulting) because quoting from his memo MISREPRESENTS the memo.

Yoo then shows the kind of understanding of case law and differentiation between *dicta* and holdings that would be deemed less than acceptable at any B grad law school. He is being misrepresented, he says, bc his statement is a *summary* of the Sup Ct holding in *Near*.

"The sentence only summarized a 1931 holding of the Supreme Court in the case of *Near v.*

Minnesota"

he says, and goes on to then quote the "holding" that he is summarizing:

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right." The Court continued: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Except, of course, that as mentioned, the actual case in front of the *Near* court, the actual matter on which they held, involved a State's prior restraints statute that was struck down. So Yoo first converts *dicta* to a holding, then mis-summarizes it in his memo, then can't understand why anyone would roll their eyes.

John Yoo, having stripped this passage out of the context in which it appears in *Near v. Minnesota* to make the opinion say something it didn't, then complains that it has been stripped of context in the press.

So before we even get into whether this memo is about the First Amendment or not, appreciate the irony of John Yoo, master of flipping the meaning of existing law by ripping it out of context, bitching that he has been taken out of context.

Waging War on the First Amendment

Now before we look at Yoo's use of the First Amendment in this memo, note how he envisions the military might be used domestically.

Military actions might encompass making arrests, seizing documents or other property, searching persons or places or keeping them under surveillance, intercepting electronic or wireless communications, setting up roadblocks, interviewing witnesses, and searching for suspects.

On its face, these actions appear to be prohibited by the Fourth Amendment, not the First—though Yoo's long digression into discussions of Court interpretations of whether or not destruction of property amounts to a "taking" under the Fifth Amendment (a move he also references in his column) suggests he has thought about that Amendment, too, presumably in the context of whether or not the government can freeze the assets of those claimed to be supporters of terrorism.

But in the age of the Internet—in which web pages are the published form of many documents—"seizing documents" may well entail asking an ISP to shut down a website or even seizing a server. In other words, the 21st Century equivalent to seizing documents may get you to the explicit issue at question in Near—whether the government could prevent someone from publishing something ahead of time.

The same is true of "intercepting electronic or wireless communication." As part of its efforts to intercept electronic communications, the government mined data to identify targets, thereby using how we speak (if not what we say, which may have been mined as well) to accomplish this goal.

So even just taking the way in which the government went about implementing the purposes Yoo envisions in this memo—including but not limited to seizing documents and intercepting

communications—these actions "subordinate" the First Amendment to military operations in the United States.

And then look at two more mentions that Yoo introduces in a First Amendment case. As Mary mentioned, Yoo also mentioned this passage from *Near*:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.

Think about how, in the addled minds of John Yoo or Donald Rumsfeld, such language might justify CIFA—the domestic spying operation operated through DOD that put together databases of those who, because they had exercised First Amendment rights to protest the war, were considered a potential threat to military operations. This kind of passage, taken "out-of-context" by the Bush Administration, gets you quickly to databases targeting peaceful Quakers.

And consider another Yoo reference to abridgment of the First Amendment.

State and federal court reviewing the deployment of military force domestically by State Governors to quell civil disorder and to protect the public from violent attack have repeatedly noted that the constitutional protections of the Bill of Rights do not apply to military operations the same way that they apply to peacetime law enforcement activities.

[snip]

"[Whatever force is requisite for the defense of the community or of individuals is also lawful. The principle runs through civil life, and has a twofold application at

war—externally against the enemy, and internally as a justification for acts that are necessary for the common defense, however subversive they may be of rights which in the ordinary course of events are inviolable." Hatfield, 81 S.E. at 537 ... (upholding the Governor's seizure of a newspaper printing press during a time of domestic insurrection).

Again, Yoo resorts to an example implicating the First Amendment to make his argument.

Now, Yoo claims that those criticizing this memo haven't read the whole thing.

In releasing these memos, the Obama administration may be attempting to appease its antiwar base – which won't bother to read the memos in full – or trying to look good for the chattering classes.

What he doesn't admit, of course, is that those of us who have read the whole thing will only be more and more convinced that Yoo aimed directly at a number of Amendments with this memo.

How nice that Yoo availed himself of the First Amendment he was targeting to claim that he wasn't targeting it.