JOHN YOO AND THE OBAMA WHITE PAPER AND KILLING AMERICANS IN AMERICA AND YEMEN

Just for shits and giggles, compare this paragraph:

> In the normal domestic law enforcement context, the use of deadly force is considered a "seizure" under the Fourth Amendment. The Supreme Court has examined the constitutionality of the use of deadly force under an objective "reasonableness" standard. *See Tennessee* v. *Garner,* 471 U.S. 1, 7, 11 (1985). The question whether a particular use of deadly force is "reasonable" requires an assessment of "the totality of the circumstances" that balances '"the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 8-9 (quoting *United States* v. *Place,* 462 U.S. 696, 703 (1983)). Because "[t]he intrusiveness of a seizure by means of deadly force is unmatched," *id.* at 9, the governmental interests in using such force must be powerful. Deadly force, however, may be justified if the danger to the officer's or an innocent third party's life or safety is sufficiently great. *See* Memorandum to Files, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* (Aug. 19, 1996).

With this one:

> The Fourth Amendment "reasonableness" test is situation-dependent. Cf Scott, 550 U.S. at 382 ("Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"'). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," Garner, 471 U.S. at 8- the interests in protecting the lives of Americans.

The first paragraph comes from this October 23, 2001 Office of Legal Counsel Memo authored by John Yoo. The second comes from the Obama Administration's November 8, 2011 White Paper on targeted killing.

The Yoo paragraph was a bit of an odd diversion in a memo otherwise laying the groundwork to allow DOD to conduct searches in the US; as far as I know, it was primarily used to enable the National Security Agency (which, after all, is part of DOD) to conduct warrantless searches of US person communications collected within the US. But along the way, Yoo threw in deadly force

– within the US – because he had already suspended the Fourth Amendment in the memo and so why not?

The White Paper paragraph would be a relatively uncontroversial paragraph among other more controversial ones authorizing the President to kill an American with no due process. Except that it collapses the distinction between laws that apply to the military and laws that apply to the CIA.

> And then, perhaps unsurprisingly, the Fourth Amendment discussion in paragraph 21 (the first in section IIB) only applies to those targeting the US, not members of an AUMF enemy per se.
>
> > Similarly, assuming that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a "seizure" under the Fourth Amendment, such an operation would not violate that Amendment in the circumstances posited here.
>
> But wait! The passage goes on to cite two domestic law enforcement cases, Tennessee v. Garner and Scott v. Harris. That's a problem, because Article II authorities are going to be a covert operation, and therefore the CIA, which is prohibited from serving as a law enforcement agency.

Nevertheless, these respective paragraphs – insofar as they apply domestic law enforcement precedents to purported real threats – are somewhat reasonable expansions of the authority, confirmed in Tennessee v. Garner, to kill an American in hot pursuit, within the context of more controversial memos.

There are two reasons to look further than that,

however.

The Posse Comitatus Question

First, there's Yoo's analysis, which was treated as law for 7 years, that in the War on Terror, the Posse Comitatus Act did not apply.

> Both the express language of the PCA and its history show clearly that it was intended to prevent the use of the military for domestic *law enforcement* purposes. It does not address the deployment of troops for domestic *military* operations against potential attacks on the United States. Both the Justice Department and the Defense Department have accordingly interpreted the PCA *not* to bar military deployments that pursue a military or foreign policy function.
>
> [snip]
>
> Because using military force to combat terrorist attacks would be for the purpose of protecting the nation's security, rather than executing the laws, domestic deployment in the current situation would not violate the PCA.

Armando Llorens and Adam Serwer have debated — specifically in the context of whether the President could kill Americans within the US — whether PCA applies in this war. And while they're staging an interesting argument (I think both are engaging the AUMF fallacy and therefore not discussing how a President would most likely kill Americans in the US), what the Yoo memo shows, at the least, is that the folks running the Executive Branch believed, for 7 years, the PCA did not apply.

~~To be clear, this memo was withdrawn in October 2008 (though not without some pressure from Congress). While the PCA aspect of the opinion is one of the less controversial aspects in the memo, as far as we know it has not been replaced~~

~~by similar language in another memo. So while this shows that PCA was, for all intents and purposes, suspended for 7 years (as witnessed by NSA's wiretapping of Americans), it doesn't mean PCA remains suspended.~~

Update: Read this post. Bradbury didn't withdraw the memo. He urged people to use caution before relying on Yoo's earlier memo. And while he specifically takes apart Yoo's language on PCA, he leaves intact the military purpose doctrine, including for the use of military force.

The Lackawanna Six and the First Dead American

The earlier Yoo memo is also interesting to review in light of the debate the Bush Administration had in 2002 about whether they ought to use it to declare the Lackawanna Six enemy combatants.

> Some of the advisers to President George W. Bush, including Vice President Dick Cheney, argued that a president had the power to use the military on domestic soil to sweep up the terrorism suspects, who came to be known as the Lackawanna Six, and declare them enemy combatants.
>
> Mr. Bush ultimately decided against the proposal to use military force.

Dick Cheney espoused doing so because, DOJ worried, the government didn't have a strong enough case against the Six.

> Former officials said the 2002 debate arose partly from Justice Department concerns that there might not be enough evidence to arrest and successfully prosecute the suspects in Lackawanna. Mr. Cheney, the officials said, had argued that the administration would need a lower threshold of evidence to declare them enemy combatants and keep them in military custody.

Call me crazy, but there's reason to believe DOJ

believed any case against Anwar al-Awlaki had similar weaknesses.

The Lackawanna Six, under pressure of being named enemy combatants, all plead guilty to material support; all have or are reaching the end of their sentence.

Which is where this comes full circle.

Because just months after Dick Cheney contemplated sending the military to capture 5 guys outside of Buffalo (the sixth was in Bahrain getting married), the US killed the first American in a drone strike in Yemen, Kamal Derwish, purportedly the recruiter for the Six.

The same impetus that first contemplated using military force in the US ended in the first drone death of an American. And now, in discussion of the memo authorizing the death of another American (or three) in Yemen, we're back to discussing whether the President can authorize targeted killings within the US.

I'm not saying the white paper is as outrageous as the Yoo memo. In some ways it is more defensible. In others—specifically in its application to the CIA—it is more of a stretch.

But, as this relatively reasonable paragraph from less reasonable memos makes clear, we really haven't moved that far beyond where Dick Cheney was in 2002.