JOHN YOO'S OLD TRASH AND THE SOUTH SHORE APARTMENT INVASION

Since the invasion of an apartment building at 7500 S. South Shore on September 30, in the same week that Trump sent notice to Congress ostensibly authorizing his murderboat strikes in the Caribbean, I haven't stopped thinking about this John Yoo opinion from October 2001.

It considers the legality of using military forces to combat terrorist threats inside the United States, with an extensive discussion about whether the Fourth Amendment would prevent the military from seizing and securing an entire apartment building — as CBP did in the September 30 raid — and detaining, searching, and interrogating everyone found inside.

> The view that the Fourth Amendment does not apply to domestic military operations against terrorists makes eminent sense. Consider, for example, a case in which a military commander, authorized to use force domestically, received information that, although credible, did not amount to probable cause, that a terrorist group had concealed a weapon of mass destruction in an apartment building. In order to prevent a disaster in which hundreds or thousands of lives would be lost, **the commander should be able to immediately seize and secure the entire building, evacuate and search the premises, and detain, search, and interrogate everyone found inside**. If done by the police for ordinary law enforcement purposes, such actions most likely would be held to violate the Fourth Amendment. See Ybarra v. Illinois, 444 U.S. 85 (1979) (Fourth Amendment violated by evidence search of all persons who are found on compact premises subject to search warrant, even

> when police have a reasonable belief that such persons are connected with drug trafficking and may be concealing contraband). To subject the military to the warrant and probable cause requirement that the courts impose on the police would make essential military operations such as this utterly impossible. If the military are to protect public interests of the highest order, the officer on the scene must be able to "exercise unquestioned command of the situation." Michigan v. Summers, 452 U.S. 692, 703 (1981).34
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> 34 In a case decided not long after the end of the Civil War, the Supreme Court of Illinois reached similar conclusions. See Johnson v. Jones, 44 III. 142 (1867), 1867 WL 5117. This was an action in trespass brought by an alleged Confederate sympathizer in Illinois who had been arrested and imprisoned in a military fortress, purportedly on the authority of President Lincoln's orders. The court rejected the defense that the plaintiff had been arrested as a belligerent and held as a prisoner of war. It did, however, state that had the plaintiff been a belligerent, "the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose – even unto death." 1867 WL at '5. Further, although the court also rejected the defense that the arrest was justified as an exercise of martial law, it also stated that "[i]f a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, be can arrest and detain him so long as may be necessary for the security or success of

> his army. He can do this under the same necessity which will justify him, when an emergency requires it, in seizing or destroying the private property' of a citizen." Id. at *7. In terrorist wars, unlike conventional warfare, there are of course no battle lines, and the theater of operations may well be in heavily populated urban settings. We think, however, that the same principle applies, and that a military commander operating in such a theater has the same emergency powers of arrest and detention.

As far as I'm aware, the memo was only used as an interim thought piece in 2001.

Rather than using the memo to seize entire office buildings, I believe it served as a basis to seize entire data streams and scanning all of it to search for "terrorist" content.

But the example Yoo envisioned years ago is not far off what we saw on September 30.

While subsequent reporting suggests that the raid arose out of a tip that the slum landlord who owns the building gave to the FBI (meaning, they used CBP as a means to clear the building they had refused to pay to secure), in execution, a number of aspects of the raid looks just like what the raid Yoo envisioned two decades ago.

The raid took place in the middle of the night; a warranted search would mandate permissible hours — usually after dawn — when the search could be conducted.

The entire raid was predicated on the presence of (initially) two and in retrospect just a single Tren de Aragua member. But virtually every one was detained while law enforcement searched for active warrants, and 37 people were arrested. With the exception of a few apartments, the entire building was searched, and left in a mess.

> Federal agents pounded on the door of his South Shore apartment about 2 a.m. Tuesday.
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> “I told them they must have the wrong apartment,” the man said.
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> But armed agents busted open many doors after arriving in U-Haul trucks to raid the 130-unit apartment building at 7500 S. South Shore Drive. They woke up residents to handcuff them with zip ties and led them into unmarked vans.
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> Rodrick Johnson, a U.S. citizen, said he heard “people dropping on the roof” before FBI agents kicked in his door. He was stuffed inside a van with his neighbors for what felt like several hours until agents told them the building was clear, he said.
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> “They didn’t tell me why I was being detained,” Johnson said. “They left people’s doors open, firearms, money, whatever, right there in the open.”
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> A Department of Homeland Security spokesperson said federal agencies arrested at least 37 people in the operation at the building, which they claimed is frequented by members of Venezulan gang Tren de Aragua. About 300 federal agents, some landing on the roof from helicopters, descended upon the building, according to NewsNation, which was invited along for the operation.
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> The report didn’t mention women and children appear to be among the detained, said Brandon Lee, a spokesman with the Illinois Coalition for Immigrant and Refugee Rights. Organizers worry many people were taken without warrants.
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> “These were families with their children escorted out in the middle of the night,” Lee said. “This administration

> is using PR efforts to try to turn communities against their neighbors."
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> Residents said the building had become home to Venezuelan migrants. The raid saw people's apartments turned upside down, citizens held for hours and their neighbors taken away to unknown places. Belongings were stolen from apartments after the agents left the building open.

In other words, this raid looks just like what we would expect if Stephen Miller were applying already-dodgy John Yoo opinions targeting terrorists who really did launch a military style attack on the US, and applied it, instead, against a gang that Miller has lied persistently to turn into something greater than it is.

And if that doesn't already terrify you, much of the rest of the opinion addresses the kinds of things Miller openly fever dreams about, such as the subjection of "loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal."

> State and federal court decisions 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 in the same way that they apply to peacetime law enforcement activities. Thus, the courts have explained that "[w]ar has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be

> illegal.” Commonwealth ex rel. Wadsworth v. Shortall, 55 A. 952, 955 (Pa. 1903) (holding that in time of domestic disorder the shooting by a sentry of an approaching man who would not halt was not illegal). “[W]hatever 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 in 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 (internal quotations omitted) (upholding the Governor’s seizure of a newspaper printing press during a time of domestic insurrection).35
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> Our view that the Fourth Amendment does not apply to domestic military operations receives support from federal court cases involving the destruction of property. In a line of cases arising from several wars, the federal courts have upheld the authority of the Government, acting under the imperative military necessity, to destroy property even when it belongs to United States citizens and even when the action occurs on American soil. Such destruction of property might constitute a seizure under the Fourth Amendment. Moreover, the courts have held, even if such seizures might otherwise constitute “takings” under the Fifth Amendment, the exigent circumstances in which they occurred absolve the Government from liability. The cases articulate a general rule that “the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field.” United States v. Pacific R.R.

> Co., 120 U.S. 227, 239 (1887)" Although these decisions arise under the Fifth Amendment rather than the Fourth, we think that they illuminate the Government's ability to "search" and "seize" even innocent United States persons and their property for reasons of overriding military necessity. For if wartime necessity justifies the Government's decision to destroy property, it certainly must also permit the Government to temporarily search and seize it.
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> 35 See also Powers Mercantile Co., 7 F. Supp. at 868 (upholding the seizure of a factory to prevent a violent attack by a mob and noting that "[u]nder military rule, constitutional rights of individuals must give way to the necessities of the situation; and the deprivation of such rights, made necessary in order to restore the community to order under the law, cannot be made the basis for injunction or redress"); Swope, 28 P.2d at 7 (upholding the seizure and detention of a suspected fomenter of domestic insurrection by the "military arm of the government," noting that "there is no limit [to the executive's power to safeguard public order] but the necessities and exigency of the situation" and that "in this respect there is no difference between a public war and domestic insurrection") (emphasis added) (quotations and citation omitted); In re Moyer, 85 P. 190, 193 (Colo. 1904) ("The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting other to commit such acts, violates none of his constitutional rights."); In re Boyle, 57 P. 706, 707 (Idaho 1899) (upholding the seizure and detention of a suspected rebel during time of domestic disorder).

> 36 See also Heflebower v. United States, 21 Ct. Cl. 228, 237-38 (1886) ("There is a distinction to be drawn between property used for Government purposes and property destroyed for the public safety. . . . [I]f the taking, using, or occupying was in the nature of destruction for the general welfare or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss, in the absence of positive legislation, must be borne by him on whom it falls, and no obligation to pay can be imputed to the Government.").

We don't yet know the full extent of justification for the abuses CBP engaged in on September 30. While I don't follow the Chicago docket as closely as many, I've seen no more than two people who might have been arrested in the raid, and that off a warrant in another state.

Which is to say, we don't yet know precisely what CBP imagined they were doing in the apartment building. We only know that it looks like Stephen Miller adopted one of John Yoo's discredited bad ideas and tested it in practice.