YES, THE GOVERNMENT DOES BELIEVE THE MILITARY CAN USE MILITARY FORCE IN THE US

I made an error.

In this post, I suggested that debates about whether the 2001 Authorization to Use Military Force constituted an exception to the Posse Comitatus Act ignore that for 7 years — from the time John Yoo wrote a memo on whether the Fourth Amendment inhibited military deployment in the US in 2001 until the time Steven Bradbury "withdrew" the memo in 2008 — the official position of the Executive Branch was that PCA had been suspended under the AUMF.

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 To be clear, this memo was withdrawn in October 2008 (though not without some pressure from Congress). While the PCA aspect of the opinion is one of the less controversial aspects in the memo, as far as we know it has not been replaced by similar language in another memo.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

My error was in suggesting Bradbury "withdrew" the memo.

He did not.

Instead, Bradbury directed that "caution should be exercised" before relying on it.

> The purpose of this memorandum is to advise that caution should be exercised before relying in any respect on the Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001) ("10/23/01 Memorandum") as a precedent of the Office of Legal Counsel, and that certain propositions stated in the 10/23/01 Memorandum, as described below, should not be treated as authoritative for any purpose.

As noted, he said that five propositions in the Yoo memo should not be treated as authoritative for any purpose.

> We also judge it necessary to point out that the 10/23/01 Memorandum states several specific propositions that are either incorrect or highly questionable. The memorandum's treatment of the following propositions is not satisfactory and should not be treated as authoritative for any purpose:

But then, in a series of bullet points laying out the problems with those five propositions, Bradbury doesn't always dismiss the outcomes

Yoo's analysis supported, but in several cases accepts the outcomes but simply provides a different basis for supporting them.

Indeed, that's what he does with Yoo's determinations that PCA was suspended.

> The memorandum concludes in part IV(A), pages 16-20, that **the domestic deployment of the Armed Forces by the President to prevent and deter terrorism would fundamentally serve a military purpose**, rather than a law enforcement purpose, and therefore the Posse Comitatus Act, 18 U.S.C. § 1385 (2000), would not apply to such operations. Although **the "military purpose" doctrine is a well-established limitation on the applicability of the Posse Comitatus Act**, the broad conclusion reached in part IV(A) of the 10/23/01 Memorandum is far too general and divorced from specific facts and circumstances to be useful as an authoritative precedent of OLC.
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> The memorandum, on pages 20-21, treats the Authorization for Use of Military Force ("AUMF"), enacted by Congress in the immediate wake of 9/11, Pub. L. No. 107-40,115 Stat. 224 (Sept. 18, 2001), as a statutory exception to the Posse Comitatus Act's restriction on the use of the military for domestic law enforcement. **The better view, however, is that a reasonable and necessary use of military force taken under the authority of the AUMF would be a military action, potentially subject to the established "military purpose" doctrine, rather than a law enforcement action**.

These are two very odd bullets. In the first, he says that Yoo's conclusion in IV(A), which includes this analysis…

> 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]
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> Central to our conclusion that the PCA does not apply is the distinction between "military" and "law enforcement" purpose. To be sure, distinguishing between the two functions is no easy matter. This is not only for the general reason that "the President has discretionary responsibilities in a broad variety of areas, many of them sensitive. In many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action." Nixon v. Fitzgerald, 457 U.S. at 756. It is also because, in the conflict against terrorism, national security and law enforcement activities, objectives and interests may inevitably overlap. For example, the September 11 attacks were both acts of war and crimes under United States law. Future terrorist incidents could continue to have both aspects. If the President were to deploy the Aimed Forces within the United States in order to engage in counter-terrorism operations, their actions could resemble, overlap with, and assist ordinary law enforcement activity. Military action 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. Moreover, the information gathered in such efforts could be of considerable use to federal prosecutors if the Government were to prosecute against captured terrorists. [my emphasis]

… Is far too general.

But in the very next bullet, Bradbury says that rather than relying on the claim that the AUMF provided a statutory exception to PCA, the government should instead rely on the military purpose doctrine, precisely what Yoo maps out in IV(A).

And he does this with regards to "a reasonable and necessary use of military force," not just military spying.

Note, too, what Bradbury says should not be relied on: Section IV(A) in its entirety and pages 20-21 pertaining to the AUMF, plus, in another bullet, language on pages 21-22 pertaining to the Insurrection Act. He very specifically doesn't throw out all of Section IV (which encompasses just an introduction plus sections A and B), or for that matter, all of Section IV(B). That selectivity would lead the following two passages — from the intro to Section IV and the summary of Section IV(B) (or perhaps all of section IV?) that appears on page 22 — intact (though "caution should be exercised"!).

> We conclude that the PCA does not apply to, and does not prohibit, a Presidential decision to deploy the Armed Forces domestically for military purposes. We believe that domestic deployment of the Armed Forces to prevent and deter terrorism is fundamentally military, rather than law

> enforcement, in character.
>
> [snip]
>
> We conclude that the PCA would not apply to the use of the Armed Forces by the President domestically to deter and prevent terrorist acts within the United States. Use of the Armed Forces would promote a military, rather than a law enforcement, purpose. In any event, the proposed Presidential deployments are exempt from the PCA, because the President has both constitutional and statutory authorization to use military forces in the present context.

In other words, while Bradbury's memo made a big show of debunking Yoo's logic in sections finding PCA did not apply, he in fact reinforced the invocation of military doctrine provided "caution be exercised" and the logic behind it be more specific than the wholesale domestic military deployments Yoo maps out in IV(A).

Now, remember, as far as we know, in practice, Yoo's memo served to justify DOD — in the form of NSA — violating the Fourth Amendment in the US for the illegal wiretap program, thus the import of the wiretapping language I bolded above. (Though Dick Cheney tried to use it to have the military arrest the Lackawanna Six because he didn't think they had enough evidence for a civilian trial.)

That purpose, exercised after "the wall" between intelligence and law enforcement intercepts had been breached, would be particularly sensitive with regards to PCA (because domestic military intercepts would be and are used by law enforcement). Bradbury wrote his "caution should be exercised" memo after Congress had already ratified the illegal wiretap program in FISA Amendments Act; indeed, he stalled on writing this "caution should be exercised" for six months until he had that statutory cover. So his language retaining the military purpose doctrine

would serve to support the proposition that it is a military purpose (of NSA) to conduct massive collections of telecoms within the United States, and he overcomes any caution with a great deal of Congressional cover.

As it happens, Bradbury's "cautions" about Yoo's evisceration of the Fourth Amendment are actually quite limited too, invoking the reasonableness DOJ used to authorize the NSA programs.

> The Fourth Amendment is fully applicable to domestic military operations, though the application of the Fourth Amendment's essential "reasonableness" requirement to particular circumstances will be sensitive to the exigencies of military actions.

So while Bradbury did retrieve the Fourth Amendment from John Yoo's dustbin, he did so with significant caveats for military exigencies.

In sum, Bradbury's cautions about the Yoo memo do withdraw parts of his language. But the memo as a whole reserves the right of the military to operate within the US doing anything that can be claimed as part of military purpose.

You know? Such as the Congressionally authorized military purpose of training to conduct surveillance using military drones within domestic airspace and keeping the data incidentally collected? So while Customs and Border Patrol is not yet (it claims) using the military technologies of signals interception and human recognition the drones are capable of, we should assume the military is training its personnel on precisely those technologies and keeping any incidentally collected US person data.

Or how about the Special Forces conducting joint training exercises in downtown Miami or Chicago, including shooting blank rounds? You can justify a whole lot of military exigencies under the

need to train the military (which, of course, just formally rolled out its SOCOM function in Northcom, which will presumably need to do lots of training).

And while we're discussing it, what kind of Congressionally authorized military exigencies does fighting cyberattacks within the US require?

To be clear, Bradbury's assertion that the military purpose doctrine allows the military to operate in the US is not all that controversial. The Congressional Research Service said this about military purpose doctrine, even before 9/11 (note the Air Force — whose drones are practicing surveillance techniques on Americans — is hosting this memo).

> The armed forces, when in performance of their military responsibilities, are beyond the reach of the Posse Comitatus Act and its statutory and regulatory supplements. Analysis of constitutional or statutory exceptions is unnecessary in such cases. The original debates make it clear that the Act was designed to prevent use of the armed forces to execute civilian law. Congress did not intend to limit the authority of the Army to perform its military duties. The legislative history, however, does not resolve the question of whether the Act prohibits the Army from performing its military duties in a manner which affords incidental benefits to civilian law enforcement officers.
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> The courts and commentators believe that it does not. As long as the primary purpose of an activity is to address a military purpose, the activity need not be abandoned simply because it also assists civilian law enforcement efforts.

Moreover, it is a far cry from justifying the

use of the military to wiretap Americans, whether via tapping the circuits at NSA or collecting intercepts from drones in the guise of training, and justifying the use of the military to conduct a targeted killing within the US.

Bradbury's call for caution is probably precisely where the Obama Administration is: advising caution before they'd conduct targeted killing in the US.

All that said, this conclusion is offered **without caution** in his still active OLC memo.

> a reasonable and necessary use of military force taken under the authority of the AUMF would be a military action, potentially subject to the established "military purpose" doctrine, rather than a law enforcement action

This is, then, an active OLC memo that envisions "a reasonable and necessary use of military force" — force, not just technologies — within the US being legal "under the authority of the AUMF" under the military purpose doctrine.