

MISSING THE DEPLOYED MILITARY FOR THE TREES

In his post on the story that Cheney wanted to use the military to capture the Lackawanna Six, Scott Horton claims that the October 23, 2001 memo was written (seemingly exclusively) for the kinds of actions Cheney envisioned.

So the Yoo memoranda were almost certainly prepared in order to support a case for the domestic use of the military and in the hopes that by deploying the military, the Constitutional limitations on police action and arrests could simply be avoided.

He also confuses the memos in question, claiming a relatively (!) innocuous memo written for David Kris is the "principal memo" and forgetting that what is really the principal memo in question—the October 23, 2001 one—already has been released (though also read this Jason Leopold comment on a September 21, 2001 memo that is crucial as well).

The disclosures shed considerable light on two memoranda prepared in the Justice Department's Office of Legal Counsel by John Yoo (with the help of Robert J. Delahunty on the second memo) at the request of then-White House counsel Alberto Gonzales. The principal memo was part of a group published by the Obama Administration on May 16, provoking widespread public concern. In the memo, Yoo argued that the Fourth Amendment could be viewed as suspended in the event of domestic operations by the military in war time. The second memo, not yet released but [discussed here](#) by Prof. Kim Scheppelle on the basis of

references to it in other documents, apparently attempted to read the Posse Comitatus Act of 1878, which forbids the domestic deployment of the military for police functions, into oblivion.

This confusion—and the claims that the October 23 memo primarily envisions the arrest of alleged terrorists by the military—is troublesome, IMO, because it obscures the other known application of the October 23 memo: the authorization of domestic surveillance by the military.

We know the Bush Administration had already used the memo in question—at least hypothetically—by the time Cheney floated using the military to detain the Lackawanna Six because Steven Bradbury listed the memo as one of those underlying the domestic surveillance program. Granted, the recent IG Report says any earlier memo—including, probably, the one Leopold notes—is hypothetical (though definitely related). But as late as April 2008, Michael Mukasey was parsing wildly about whether the memo was still in effect—and it had not yet been withdrawn. It was not ultimately withdrawn until after FISA Amendments Act passed and Patrick Leahy kept nagging about it.

I'm insisting, perhaps pedantically, on maintaining this distinction for two reasons. First, because at least according to Steven Bradbury, the military already was deployed domestically against Americans. That's what the domestic surveillance program was (and largely still is): the use of DOD's NSA-related capabilities to detain and search American property—their email—and to hell with the collateral damage.

Also, it's important to retain this distinction to avoid falling into Cheney revisionism that appears rife right now. I said in comments to my post on this that this Lackawanna story may partly serve the past administration by distracting away from the known uses of the

October 23, 2001 memo. If everyone focuses on the hypothetical, but never realized, use of the memo with the Lackawanna Six, they forget that the memo was used, at least partly, to justify seizing and searching the emails of millions of Americans.

Horton acknowledges but does not question the problem with his reference to the Bush myth on the Libby pardon.

The latest disclosures occur during a mounting feud between Bush and Cheney that was launched with *Time* magazine's disclosure that Bush rebuffed Cheney's aggressive play to secure a full pardon for his close friend and former chief of staff, Scooter Libby. Cheney responded to the *Time* article with a barely civil statement to the effect that Libby had been entitled to the pardon. The new disclosure seems again designed to show Cheney as an extremist whose advice was not always followed by Bush.

"Seems ... designed to show..." ought to be the tip off to look further, to question the facade. And behind the facade of hypothetical but unrealized deployment of the military against Americans lies the reality of deployment of military capabilities to violate the Fourth Amendment of Americans across the country.