

---

# INTERNATIONAL & NATIONAL SECURITY LAW

## THE FOURTH AMENDMENT GOES TO WAR

By Robert J. Delahunty\*

---

Early one morning last March, I received a phone call from David Barron, who had recently begun working for the Obama Administration as Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel (OLC). David and I had been colleagues at OLC during the Clinton Administration. I stayed on the OLC staff to work for President Bush, and David moved on to become a member of the Harvard Law School faculty. We remained on friendly terms. David was calling to give me a head's up that later in the day the Justice Department would be releasing ten OLC memoranda from the Bush Administration, two of which I had co-authored.<sup>1</sup> (I was, and am, very grateful to David for his thoughtfulness.)

The media storm that broke out upon the memos' release was brief but (predictably) intense, and the focus was on one of the opinions that I had co-authored. "Quite astounding," opined the head of the ACLU's national security project.<sup>2</sup> "[A] theory of presidential power amounting to virtual dictatorship," wrote Rosa Brooks.<sup>3</sup> The opinion permitted the military to "search anyone's home, wiretap anyone's phone, or arrest and hold any citizen, all without a warrant, and based on the flimsiest suspicion," said Lawrence Rosenthal.<sup>4</sup> Newsweek's Michael Isikoff—the author of the discredited 2005 report that U.S. interrogators at Guantanamo had flushed a Koran down a toilet to offend detainees<sup>5</sup>—characterized the opinion as an effort to "potentially suspend First Amendment freedom-of-the-press rights in order to combat the terror threat."<sup>6</sup> Ironically, only a few days after the opinions were released, the media reported that President Obama was considering the deployment of troops along the Mexican border to control escalating violence there—a report that triggered no angry outbursts from the "civil libertarians" who shortly before had been denouncing an eight-year-old legal opinion from the Bush Administration because it envisaged the domestic use of the military.<sup>7</sup>

The opinion that provoked this outcry was prepared by John Yoo, then a Deputy Assistant Attorney General at OLC, and me. At the time, I was a senior civil servant at OLC. (Previously, I had worked in the Justice Department for fifteen years under four Presidents.) The opinion was written for Alberto Gonzales, then the White House Counsel, and William J. Haynes II, then the General Counsel of the Defense Department.<sup>8</sup> The opinion was dated October 23, 2001—not yet six weeks after the September 11, 2001, attacks on the World Trade Center and the Pentagon and the planned

but abortive attack on the Capitol, of September 11, 2001. Stated in full, the propositions in the opinion that attracted the critics' ire were these:

Fourth, we turn to the question whether the Fourth Amendment would apply to the use of the military domestically against foreign terrorists. Although the situation is novel (at least in the nation's recent experience), we think that the better view is that the Fourth Amendment would not apply in these circumstances. Thus, for example, we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probable cause or to obtain a warrant.

Fifth, we examine the consequences of assuming that the Fourth Amendment applies to domestic military operations against terrorists. Even if such were the case, we believe that the courts would not generally require a warrant, at least when the action was authorized by the President or other high executive branch official. The Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable.<sup>9</sup>

Those propositions seemed to me entirely defensible in the circumstances of October 2001, and while we may perceive the risks of terrorism differently eight years later, I believe that those propositions would still hold true if comparable terrorist threats were to emerge again<sup>10</sup>—as they did in the November 26-29, 2008 attacks attributed to the terrorist group Lashkar-e-Taiba on the city of Mumbai in India. The Mumbai attacks killed 172 people, overwhelmed local police contingents (including the Anti-Terrorism Squad), and required the Indian government to deploy army and marine units—including the elite National Security Guard or "Black Cat Commandos"—into the city to conduct search-and-rescue operations and to engage the terrorists in combat.<sup>11</sup>

In what follows, I shall first examine the factual and legal circumstances in which the 10/23/01 OLC Opinion was prepared. In that section, I will explain why the "war paradigm"—rather than the previously-prevailing "law enforcement paradigm"—was the underlying presupposition of the opinion. Second, I will briefly outline a general understanding of how the Bill of Rights has been interpreted and applied in wartime or other similar crisis situations. Third, in light of that background, I will analyze and defend the opinion's conclusions that the Fourth Amendment would not apply to domestic military operations against al Qaeda or other, similar terrorist groups, or that, in the alternative, the courts would apply only a relaxed "reasonableness" test to such operations.

---

\*Associate Professor, University of St. Thomas School of Law, Minneapolis, MN. I would like to thank Thomas J. Alford, Teresa S. Collett, Michael S. Paulsen, Antonio F. Perez, John Radsan, Jeffrey K. Shapiro, Gregory Sisk, and John C. Yoo for their comments, and Joel Whitlock, Class of 2011, for his help as my Research Assistant in preparing this paper. I alone am responsible for the views expressed.

To be perfectly clear: the position being defended here is *not* that the Warrant Clause of the Fourth Amendment is somehow “suspended” during wartime, owing perhaps to an “emergency” situation. Rather, the central claim being defended is that the Warrant Clause does not *reach* the relevant military actions *in the first place*.

I.

When the 10/23/01 OLC Opinion was being prepared, the United States seemed plainly to be—in both the material and the legal sense—a nation at war. Writing in 2002, a criminal justice scholar and a retired Lieutenant Colonel succinctly described the situation as it stood in the weeks just after the 9/11 attacks:

When members of the Al Qaeda terrorist organization attacked the World Trade Center and the Pentagon with hijacked commercial aircraft on September 11, it was the first time since a young America fought pitched battles with British troops during the War of 1812 that aggressors from abroad had engaged targets on contiguous American soil. In short order, the coordinated attack by terrorists became a watershed event in U.S. history, as it led to substantial changes in the fabric of our nation’s life. Since September 11, America has been on a war footing, with armed soldiers standing guard at our nation’s airports, enhanced security at nuclear power plants and other vulnerable locations, and military jets flying combat air patrols in order to intercept and shoot down hijacked commercial aircraft. The legal climate has also been affected by the events of September 11. Congress has passed, and the President has signed, anti-terrorism legislation that expands police surveillance powers. Additionally, the President has announced that suspected terrorists who are not U.S. citizens may be tried in special military tribunals lacking many of the due process standards of American criminal courts.<sup>12</sup>

As the 10/23/01 OLC Opinion was being written, Air Force fighter jets were patrolling the skies above Washington, D.C. to protect the nation’s capital from another attack by hijacked, weaponized civilian aircraft. There had been few objections to the announcement that fighter jets had been dispatched to intercept and shoot down the aircraft hijacked on September 11,<sup>13</sup> and few objections to the subsequent announcement that procedures were being established for the military to shoot down hijacked aircraft in the future. The atmosphere throughout the country was one of apprehension and anxiety. Further attacks were expected, although there was no certainty as to when, where, or how they would occur. Against that backdrop, health officials in Florida announced on October 4, 2001 the first case of pulmonary anthrax in the United States in almost 25 years.<sup>14</sup> Later cases of anthrax exposure soon began to be reported, including several at major media outlets in New York City. In mid-October, an anthrax-laden letter was opened in the Washington, D.C. office of Senator Tom Daschle (D-SD). Congressional buildings were evacuated and federal government mail delivery in Washington, D.C. was virtually halted. An additional anthrax-

laden letter addressed to Senator Patrick Leahy (D-VT) was also discovered. Leading political figures and many members of the general public linked the anthrax episodes to the 9/11 attacks, and feared that a bioterrorist war against the United States had begun.<sup>15</sup>

Legally also, the condition of the nation was one of war. On September 18, Congress had enacted Pub. L. No. 107-40, 115 Stat. 224 (2001), entitled “Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States,” which found that the attacks of September 11 had rendered it “both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad” (emphasis added). The operative part of the statute authorized the President, without geographical limitation,

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>16</sup>

Likewise, both the United Nations Security Council<sup>17</sup> and the North Atlantic Treaty Organization<sup>18</sup> had recognized that the United States had a right of self-defense under the international law of armed conflict.

In the eight years since the 10/23/01 OLC Opinion was issued, scholars have debated whether the legal framework created by these governmental and inter-governmental decisions should continue to be applied to the “war on terror.”<sup>19</sup> Some scholars have argued that *neither* the war paradigm *nor* the law enforcement paradigm should provide the legal framework for domestic counter-terrorism, even when it requires the use of military force.<sup>20</sup> In this view, “terrorism” may present a hybrid or *sui generis* paradigm, in which the laws of war may partly apply and the rules of the criminal justice system may also partly apply. If such a paradigm could be fully articulated, it might well show that the Fourth Amendment *did* constrain the use of military force in domestic counter-terrorism operations, at least in some circumstances or to some degree.

Such a novel paradigm was not conceptually available in October 2001, however, and may not be so even eight years later. When the 10/23/01 OLC Opinion was being written, the *only* recognized alternative to the war paradigm in assessing the legality of counter-measures to al Qaeda’s attacks was the more traditional law enforcement paradigm. Although that approach had generally dominated the United States’ responses to al Qaeda before 9/11<sup>21</sup> and still had some supporters after it, it had plainly failed to prevent the attacks and seemed entirely inadequate legally and practically as a response to them.<sup>22</sup> The scale, intensity, lethality, and purposes of the 9/11 attacks and the nature of the responses they required precluded viewing them through the prism of the criminal justice system.

Second and no less important, given the decisions made by Congress, the President, the Security Council, and NATO that the United States was in a state of war and could

lawfully use its armed forces both for prosecuting that war and for defending itself, OLC was unquestionably bound to rely on the war paradigm in providing advice to the Defense Department on domestic deployments of the Armed Forces for military purposes.

How, then, would the Fourth Amendment apply to such deployments?

## II.

The Constitution was consciously designed to enable the United States to wage war effectively. The preamble of the Constitution expressly sets forth, among the basic purposes of the Founding, that of “provid[ing] for the common defence.” Over the nation’s existence, the nation’s courts and Presidents have read the Constitution with that purpose in mind. Typical of many Supreme Court pronouncements on the Constitution in wartime is its 1948 decision, *Lichter v. United States*.<sup>23</sup> There the Court said:

[I]t is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect in order that, through the Constitution, the people of the United States may in time of war as in peace bring to the support of those purposes the full force of their united action. In time of crisis nothing could be more tragic or less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.<sup>24</sup>

The Court went on to quote extensively from a celebrated address given during the First World War by Charles Evans Hughes, entitled “War Powers on the Constitution.”<sup>25</sup> As the Court noted, Hughes had said:

[T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties.<sup>26</sup>

Summing up, the *Lichter* court said:

[T]he primary implication of a war power is that it shall be an effective power to wage war successfully. Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.<sup>27</sup>

These views have been expressed, not only by the Supreme Court, but by wartime leaders such as President Abraham Lincoln. In a public letter of June 12, 1863, Lincoln wrote: “[T]he Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security.

The Constitution itself makes the distinction....”<sup>28</sup>

These general rules of interpretation apply to the Bill of Rights no less than to other constitutional provisions. Indeed, the text of the Bill of Rights makes plain on its face that its provisions may apply differently in wartime and in peace. Thus, the Third Amendment states (emphasis added): “No soldier shall, *in time of peace* be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law.*”

Likewise, the Fifth Amendment states (emphasis added): “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, *when in actual service in time of War or public danger...*”

In a similar spirit, the “mini-Bill of Rights” in Article I, § 9, cl. 2 provides for the possibility of the suspension of the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”

Although the Third Amendment is something of an orphan in the case law,<sup>29</sup> its language is instructive here. Under standard Fourth Amendment jurisprudence, no private space is more protected than the home.<sup>30</sup> Yet under the Third Amendment, the military may occupy private homes and quarter troops in them during wartime, provided that a “law” so permits.<sup>31</sup> But if the government has the power to *quarter troops* in homes in wartime—a truly massive encroachment on individual privacy—its power to *search* homes must surely also be greatly expanded during war.

Furthermore, it is not necessary for a provision of the Bill of Rights to include a specific wartime exception for it to apply differently (or not at all) during war. Consider the Takings Clause of the Fifth Amendment.<sup>32</sup> A long line of cases going back at least to the Supreme Court’s 1887 decision in *U.S. v. Pacific R.R.*<sup>33</sup> establishes that the government is not liable under the Takings Clause for private property that it destroys during military operations in wartime under the compulsion of military necessity. Moreover, this is true whether the destruction occurs on U.S. soil or overseas, and whether the property is owned by U.S. citizens or not. In *Pacific R.R.*, the plaintiff sought compensation for the Union Army’s destruction of several of its bridges during operations intended to repulse a Confederate invasion of Missouri. The Court denied the claim, saying:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, ... had to be borne by the sufferers alone.... Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.<sup>34</sup>

The Supreme Court reaffirmed the doctrine of *Pacific R.R.* in a 1952 case, *United States v. Caltex*,<sup>35</sup> in which a group

of oil companies sought compensation for the U.S. Army's demolition of their facilities and products in Manila (which was then U.S. soil) in order to prevent them from falling into the hands of the advancing Japanese Army. In denying recovery, the *Caltex* Court said that

[t]he terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.<sup>36</sup>

These and similar cases do not mean, as one court has rightly noted, that the Takings Clause is *suspended* during wartime.<sup>37</sup> But they *do* mean that the Takings Clause is simply *inapplicable* to certain losses that occur as a necessary incident of military operations.

Further, the Supreme Court's case law suggests that the Due Process Clause of the Fourteenth Amendment (and therefore, it would seem, of the Fifth Amendment) would also apply differently in time of war or other grave emergencies (such as insurrection). A case in point is Justice Holmes' decision in *Moyer v. Peabody*,<sup>38</sup> upholding against a due process challenge the authority of a state Governor, in suppressing an insurrection by military means, to detain the leader of a miners' union for two and a half months without criminal charges, until the Governor thought that it was safe to release him. In the course of his opinion, Holmes wrote broadly that "[w]hen it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment."<sup>39</sup> While it may be unlikely that *Moyer* would be decided on the same basis today,<sup>40</sup> even the much later case of *Duncan v. Kabanamoku* appeared to acknowledge "the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war."<sup>41</sup>

In sum, then, wartime conditions may profoundly affect the interpretation and application of the provisions of the Bill of Rights. In particular, some of those provisions may apply very limitedly, or even not at all, to military operations during wartime. The 10/23/01 OLC Opinion read the Fourth Amendment in that light.

### III.

The Fourth Amendment requires that police searches and seizures not be "unreasonable," and the Supreme Court has held that if the intrusion counts as a full "search" or "seizure"—as distinct, say, from a brief, investigative police "stop"—it must be based upon "probable cause." Further, the Court has also held that, in addition to requiring probable cause, the reasonableness of a "search" normally depends on the government's having obtained a warrant beforehand. The Court has, however, carved out an exception from these (largely, judge-made) requirements in cases of "special needs, beyond the normal need for law enforcement."<sup>42</sup> In a case decided not long before the 10/23/01 OLC Opinion, the Court stated that "the Fourth Amendment would almost

certainly permit an appropriately tailored roadblock [at a law enforcement checkpoint] set up to thwart an imminent terrorist attack."<sup>43</sup> Subsequently to the OLC Opinion, courts of appeals, in reliance on the "special needs" doctrine, have upheld governmental searches intended to prevent terrorist attacks.<sup>44</sup>

The requirements of reasonableness, probable cause, and a warrant apply paradigmatically to law enforcement operations. Thus, the Court has said that "[t]he Fourth Amendment was tailored explicitly for the criminal justice system,"<sup>45</sup> and that "[t]he standard of probable cause is peculiarly related to criminal investigations."<sup>46</sup> This is not to say that the Fourth Amendment applies only to police action; it has a wider scope.<sup>47</sup> But law enforcement activity remains the core subject matter to which the Fourth Amendment is addressed. The "driving force" behind the Fourth Amendment "was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel."<sup>48</sup> There is nothing to suggest that the Fourth Amendment was originally intended to apply to wartime operations carried out for military rather than law enforcement purposes by the armed forces. Application of law enforcement-based tests of reasonableness—let alone the warrant requirement—to military commanders conducting wartime operations on U.S. soil could pose a significant risk of damaging the military's ability to function in combat-type situations and to carry out its missions successfully.

While there appears to be no Supreme Court precedent directly on point, the Court's 1990 decision in *United States v. Verdugo-Urquidez* is highly illuminating. There the Court held that the Fourth Amendment did not apply to the search by Drug Enforcement Agency personnel of the Mexican residence of a Mexican citizen who had no voluntary association with the United States. The plurality found that there was "no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."<sup>49</sup> Further, acceptance of the claim that the Fourth Amendment had such extraterritorial reach "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."<sup>50</sup> Thus, the opinion reasoned, if the Fourth Amendment were held to apply to the extraterritorial activities of the military, it "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest... [and create] a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad."<sup>51</sup>

If that reasoning holds for military operations overseas, it seems to be no less true of military operations inside the United States. Suppose that the U.S. Coast Guard detects in international waters what it believes may be a vessel heading towards the United States to launch a terrorist attack on American soil—in other words, a situation like the seaborne attack on Mumbai. Assuming that the Coast Guard may intercept the vessel without having to satisfy the requirements

of “reasonableness” and “probable cause,” should the analysis be different the moment that the suspect vessel enters U.S. territorial waters? What if the vessel nears the coast and lets off its crew and passengers? What if the U.S. Air Force identifies a civilian aircraft nearing U.S. air space that refuses to respond to signaling or to disclose its flight pattern and is otherwise behaving suspiciously? Is the Air Force *more* restrained in its ability to intercept the aircraft once it enters U.S. airspace than it was before? The reasons that *Verdugo-Urquidez* outlined for thinking that the Fourth Amendment does not apply to *extraterritorial* military operations seem to hold good for military operations such as these *inside* the United States.

Or consider the kind of “urban warfare” scenario that seemed only too plausible in the immediate aftermath of the 9/11 attacks. I cannot improve here on what the 10/23/01 OLC Opinion itself said:

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*, 44 U.S. 85 (1979)... 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).<sup>52</sup>

To be sure, the 10/23/01 OLC Opinion’s argument relied critically on the distinction between law enforcement and domestic military operations. And it may on occasion be difficult to know whether to characterize a particular use of the military as one or the other. As the 10/23/01 OLC Opinion said, “[i]f the President were to deploy the Armed 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.”<sup>53</sup> Nonetheless, the distinction is clearly implicit in the Posse Comitatus Act,<sup>54</sup> which is usually regarded as a bulwark of civil liberties; and courts interpreting the Posse Comitatus Act have been able to understand and apply it without undue difficulty. Subject to certain exceptions, the Posse Comitatus Act prohibits the “willful[] use[]” of “any part of the Army or the Air Force as a posse comitatus or otherwise *to execute the laws*” (emphasis added). But just as the statute generally *forbids* the use of the Armed Forces for domestic law enforcement, so it impliedly *permits* their use for other purposes: it is a sword that cuts both ways. Under the longstanding views of both the Justice Department and the Defense Department, therefore, the Posse Comitatus Act was construed *not* to prohibit the use of the

Armed Forces in actions undertaken primarily for a military purpose.<sup>55</sup> The traditional statutory distinction between law enforcement and military operations can readily be understood to have constitutional dimensions.<sup>56</sup> It can be understood to delineate both the reach of the Fourth Amendment and its limits.

The discussion to this point has, no doubt, worn a somewhat abstract air. That is because it has so far failed to mention what would surely emerge as a crucial element in any Fourth Amendment review of a domestic military counter-terrorist operation: the existence of appropriate Rules of Engagement (ROE) governing that operation. Engagement with hostile forces is rarely, if ever, left to the unstructured discretion of military commanders in the field. Rather, it is subject to careful operational controls embedded in ROE. Such ROE (which are typically classified) exist for military operations overseas, and it is overwhelmingly likely that they have been, or would be, issued if counterterrorist operations by the military were expected within the United States.<sup>57</sup> Such ROE could enter into the Fourth Amendment analysis in either of two ways. First, if carefully crafted and conscientiously followed, they might be used to persuade reviewing courts that “reasonableness” review under the Fourth Amendment was unnecessary (since effective safeguards to govern the operation were already in place). Alternatively, defending officers might rely on compliance with such ROE to demonstrate that, taking account of their purposes and the contexts in which they acted, their conduct satisfied the Fourth Amendment’s “reasonableness” standard. What then are ROE?

ROE are “most fundamentally... the means by which the National Command Authorities... express their intent as to how force will and will not be used to achieve policy objectives.”<sup>58</sup> It is critical to understand that well-crafted ROE use military means to serve an ultimately political purpose:

[R]ules of engagement must... be carefully written so as to preclude actions that might run counter to national policy. The process requires sensitivity to the distinction between purpose and means.... The proper measure for success... is not the extent to which violations occur, but rather the congruency of the operation’s execution with its underlying political purpose.<sup>59</sup>

To take a simple example, ROE may be crafted to minimize the likelihood of civilian deaths in an air campaign targeting an enemy’s infrastructure, if only because the nation’s political leadership considers it vital to win over the local population’s support in pursuing the war. When properly designed, ROE “have three underlying bases that operate in tandem[:] ... policy, law, and operational concerns.”<sup>60</sup> Ordinarily, therefore, sound ROE “are best drafted by a team consisting of a judge advocate and [a military] operator [such as a pilot], and must be reviewed at an appropriate policy level.”<sup>61</sup> In combat situations overseas, ROE must take account of the restraints on force imposed by international *jus in bello*, specifically including the overarching principles that the use of force must be both necessary and proportionate.<sup>62</sup> Observance of these legal requirements will, of course, tend to restrict and reduce the violence used to achieve an operation’s objectives.

If ROE were developed for the use of the military in armed counter-terrorism operations inside the United States, the policy component would obviously be of quite extraordinary importance. Political and military leaders would (rightly) be extremely sensitive to the effect that the use of military force would have on American civilians and American property, and would surely endeavor by all means possible to ensure that mission achievement in purely military terms was not bought at the price of unnecessary loss of the lives of innocent American men, women, or children, avoidable destruction of their property, or offensiveness to domestic public opinion. Military planners and commanders would be acutely aware that the eyes of Congress, of the media, and of the public at large, were constantly upon them. Political leaders facing elections would also go to great lengths to restrict the use of force domestically to the most imperatively demanding situations.<sup>63</sup>

If these assumptions are sound, then the question whether the Fourth Amendment applied to such operations or not could turn out to make little practical difference in many, perhaps most, cases. Even if reviewing courts determined that the Amendment's reasonableness standard *did* apply, they would likely be highly deferential to the operational commander's decisions about the use of force.<sup>64</sup> Moreover, the courts would also be likely to categorize the operation as falling under the case law's "special needs" exception to the warrant requirement—a conclusion that the 10/23/01 OLC Opinion reached.<sup>65</sup>

Although the case law is rather meager, several judicial decisions lend support to the view that military operations against terrorists, even when carried out on U.S. soil, are not subject to the Fourth Amendment's probable cause and warrant requirements. For example, in *United States v. Green*, the Fifth Circuit examined the Fourth Amendment claim of a driver who had been stopped at a roadblock checkpoint on a military base, found to be without a license or proof of insurance, fled, was captured and arrested by military police, and discovered to be in possession of crack cocaine.<sup>66</sup> She sought to have the evidence suppressed on the grounds that it was the fruit of an "unreasonable" search. The checkpoint stop was suspicionless; the military police were stopping every sixth car (of which the driver's was one) to search for terrorists and so deter terrorism. The court agreed that the search would have been unconstitutionally unreasonable if it had been undertaken in a search for criminals or an attempt to prevent general criminal activity. But it found that the "more narrow" purpose of the checkpoint was "to protect a military post, distinct from a general law enforcement mission."<sup>67</sup> Because this purpose was more like a traditional military function than criminal law enforcement, the court held that the driver could not rely on the Fourth Amendment.

Also relevant is the European Court of Human Rights' decision in *Murray v. United Kingdom* under Article 8 of the European Convention on Human Rights—a provision resembling the Fourth Amendment.<sup>68</sup> In *Murray*, the British Army visited Murray's home in order to arrest and question her regarding her suspected terrorist activities on behalf of the Irish Republican Army. After entering, the Army searched the

house for other occupants and forced the Murray family to gather in one room. The Court observed that this was not an ordinary law enforcement action but instead a military security one. It noted the "responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organized terrorism and... the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences."<sup>69</sup> Accordingly, the Army's actions satisfied Article 8's "necessity" requirement.<sup>70</sup>

### Conclusion

I continue to believe that the main conclusions reached in the 10/23/01 OLC Opinion were sound. Despite the shrill criticisms of the opinion, I have yet to see a convincing refutation of it. Let that be a challenge to those of you who think otherwise. I am open to persuasion, as you should be.<sup>71</sup> Let Law and Reason decide.

### Endnotes

1 See Neil A. Lewis, Memos Released by Justice Dept. Show Wide View of Bush's Power, *The New York Times* at A1 (Mar. 3, 2009); R. Jeffrey Smith & Dan Eggen, Post-9/11 Memos Show More Bush-Era Legal Errors, *The Washington Post* at A5 (March 3, 2009).

2 Quoted in Smith & Eggen, *supra* n.1.

3 Rosa Brooks, Bush's big lies: Behind the sordid memos that purported to give legal justification for the war on terror, *The Los Angeles Times* (March 5, 2009), available at <http://www.latimes.com/news/opinion/commentary/la-oe-brooks5,0,2289353.column>.

4 Lawrence Rosenthal, Does John Yoo belong in front of a class? No: His work for the Bush administration suggests he's incompetent, *The Los Angeles Times* (Apr. 9, 2009), available at <http://www.latimes.com/news/opinion/commentary/la-oe-rosenthal9-2009apr09,0,592367.story>.

5 Newsweek later retracted and apologized for Isikoff's story, but not before it had sparked riots in the Muslim world that resulted in 17 deaths. See Katherine Q. Seelye & Neil A. Lewis, Newsweek Says It Is Retracting Koran Report, *The New York Times* (May 17, 2005), available at <http://query.nytimes.com/gst/fullpage.html?res=9E02E5DF1639F934A25756C0A9639C8>.

6 Michael Isikoff, Extraordinary Measures: A new memo shows just how far the Bush administration considered going in fighting the war on terror, *Newsweek* Web Exclusive, available at <http://www.newsweek.com/id/187342/output/print>. Since the memo in question was addressed to the Fourth Amendment, it might seem remarkable that Isikoff presented it as a threat to the First Amendment. He was apparently alluding to one paragraph in the 37-page single spaced memo that quoted a Supreme Court decision, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), for the (surely uncontroversial) proposition that the press has no liberty during wartime to publish the departure times of troop ships.

7 See Donna Miles, Obama Considers Deploying National Guard to U.S.-Mexico Border, *American Forces Press Service* (March 12, 2009), available at [http://www.defenselink.mil/utility/printitem.aspx?print\\_http://www.defenselink.mil/news/](http://www.defenselink.mil/utility/printitem.aspx?print_http://www.defenselink.mil/news/).

8 See Memorandum for Alberto B. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Ass't At'y Gen. and Robert J. Delahunty, Special Counsel, Re: Authority for Use of Military Force To Combat Terrorist Activities Within the United States (Oct. 23, 2001) (hereafter the 10/23/01 OLC Opinion). The opinions released in March were originally available at <http://www.usdoj.gov/opa/pr/2009/March/09-ag-181.html>.

9 10/23/01 OLC Opinion at 2.

10 I say this deliberately and in full awareness of the Memorandum to Files prepared by Steven Bradbury, Principal Deputy of OLC, on October 6,

2008, which identified the propositions at issue as “either incorrect or highly questionable.” See Memorandum for the Files from Steven G. Bradbury, Principal Deputy Ass’t Att’y Gen., Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities at 1 (Oct. 6, 2008). Respectfully, I disagree. I would further note that the 10/23/01 OLC Opinion stated that it considered the propositions only to represent “the better view” rather than as incontestable; that it drew attention to the novelty of the situation and the paucity of relevant judicial precedent; and that it argued that even if the Fourth Amendment were held to apply, courts would likely review and uphold properly conducted military operations under the “special needs” doctrine.

11 The Rand Corporation has published a full analysis of the attacks on Mumbai. See Angel Rabasa et al., *The Lessons of Mumbai* (2009), available at [http://www.rand.org/pubs/occasional\\_papers/2009/RANDOP249.pdf](http://www.rand.org/pubs/occasional_papers/2009/RANDOP249.pdf).

12 David A. Klinger & Lt. Col. Dave Grossman (U.S. Army Ret.), Responses to the September 11 Attacks: Who Should Deal with Foreign Terrorists on U.S. Soil? Socio-Legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America, 25 *Harv. J. L. & Pub. Pol’y* 815, 815 (2002).

13 For a factual account of that decision, see 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 40-44 (2004).

14 For a careful study and chronology of the events, see Center for Counterproliferation Research, Working Paper: Anthrax in America: a Chronology and Analysis of the Fall 2001 Attacks (Nov. 2002), available at <http://www.ndu.edu/centercounter/ANTHRAX%20CHRONOLOGY.pdf>.

15 For example, on October 23, 2001—the day that the OLC Opinion was signed—Representative Richard Gephardt (D-MO) described the anthrax sent to Sen. Daschle’s office as “weapons grade... highly sophisticated material” and said that while there was no proof of a link to al Qaeda, “I think we all suspect that.” Quoted in *id.* at 44.

16 For an interpretation of the sweeping language of the statute that was close in time to its enactment, see Michael Stokes Paulsen, *Youngstown Goes to War*, 19 *Const’l Comm.* 215, 222-23, 250-57 (2002).

17 See U.N. Security Council Res. 1368 (Sept. 12, 2001); U.N. Security Council Res. 1373 (Sept. 28, 2001) (recognizing and reaffirming “the inherent right of individual or collective self-defence”); see also Letter from the U.S. Permanent Representative to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force*, 4 *San Diego Int’l L. J.* 7, 17 (2003).

18 See Press Release, Statement by the North Atlantic Council on Collective Defense (Sept. 12, 2001).

19 Compare Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 128-34 (2008) (arguing that “the phrase ‘a war on terror’ is not an inapt metaphor, but rather a recognition of the way war is changing”), John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* 1-17 (2006), Daniel Statman, *Targeted Killing*, 5 *Theoretical Inquiries in Law* 178, 183-85 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art7/>, and Christopher Greenwood, *International Law and the ‘War against Terrorism,’* 78 *Int’l Aff.* 301, 307-09, 314-16 (2002), with, e.g., Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide*, 33 *Yale J. Int’l L.* 369, 376-79 (2008), Robert Jervis, *American Foreign Policy in a New Era* 46-51 (2005), and Noah Feldman, *Choices of Law, Choices of War*, 25 *Harv. J. L. & Pub. Pol’y* 457, 458-66 (2002). For a review of recent case law and legal scholarship on the circumstances in which an “armed conflict” exists, see Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* 114-23, 130 (2009).

20 Of particular interest and value is Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 *Temp. L. Rev.* 661 (2007).

21 See the 9/11 Commission Report, *supra* n.13, at 72-3; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stanford L. Rev.* 1079, 1094-95 (2008) (outlining evolution of “crime versus war” debate before 9/11). It should be pointed out, however, that the United States’ attacks in 1998 on a pharmaceutical plant

in Sudan that was believed to be producing chemical weapons for al Qaeda assumed a state of war between the United States and that organization. The Clinton Administration had argued that the attacks were justifiable as lawful self-defense under Article 51 of the U.N. Charter—thus implicitly assuming the applicability of the war paradigm to the conflict with al Qaeda. Indeed, National Security Adviser Sandy Berger described the attack in Afghanistan as directed to “a military target,” and anonymous Administration sources stated that that attack was designed to kill Osama bin Laden and as many of his associates as possible. See Sean D. Murphy, *Legal Regulation of Use of Force, Missile Attacks on Afghanistan and Sudan*, *Contemporary Practice of the United States Relating to International Law*, 93 *Am. J. Int’l L.* 161, 163-5 (1999). For legal analyses close in time to the 1999 missile strikes, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *Yale J. Int’l L.* 559 (1999); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *Hous. J. Int’l L.* 3, 47-49 (1999).

22 See Chesney & Goldsmith, *supra* n.21, at 1096-99 (summarizing reasons why criminal model was thought inadequate to new threat posed by al Qaeda); see also the exchange Kenneth Roth and Ruth Wedgwood, *Combatants or Criminals? How Washington Should Handle Terrorists*, *Foreign Affairs* (May/June 2004).

23 334 U.S. 742 (1948).

24 *Id.* at 779-80.

25 42 A.B.A. Rep. 232 (1917). Hughes had been the Republican candidate for President in the year preceding this address. His distinguished career, it will be recalled, included service as an Associate Justice, as Chief Justice, as Secretary of State, and as Governor of New York.

26 Quoted in 334 U.S. at 781.

27 *Id.* at 782.

28 Letter from Abraham Lincoln, President of the United States, to Erastus Corning and Others (June 12, 1863), quoted and discussed in Michael Stokes Paulsen, *The Constitution of Necessity*, 79 *Notre Dame L. Rev.* 1257, 1277-79 (2004).

29 On the background of the Third Amendment, its ratification history, and the practice and (sparse) case law under it, see Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 *Wm. & Mary Bill of Rights J.* 117 (1993).

30 See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (“Privacy and security in the home are central to the Fourth Amendment’s guarantees as explained in our decisions and as understood since the beginnings of the Republic.”).

31 This possibility, moreover, is not in terms limited to occasions of *declared* war, but arguably may arise when war exists as a matter of fact, and not only when it is has been formally declared. Cf. *The Prize Cases*, 67 U.S. 635, 668-69 (1862).

32 “[N]or shall private property be taken for public use, without just compensation.”

33 120 U.S. 227 (1887).

34 *Id.* at 234.

35 344 U.S. 149 (1953).

36 *Id.* at 155-56.

37 See *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1356 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005) (President Clinton had authority to determine that pharmaceutical plant in Sudan was part of al Qaeda weapons supply chain and thus “enemy” property constituting legitimate target for missile strike).

38 212 U.S. 78 (1909).

39 *Id.* at 85.

40 For an explanation of the legal culture’s changing views of civil liberties in wartime, see Jack Goldsmith & Cass Sunstein, *Military Tribunals and the Legal Culture: What A Difference Sixty Years Makes*, 19 *Const’l Comm.* 261, 284-89 (2002).

41 327 U.S. 304, 314 (1946). Also of note, in its 1987 decision in *United States v. Salerno*, the Court said that “in times of war or insurrection, when

society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous." 481 U.S. 739, 748 (1987). And even in dissent, Justice Stevens acknowledged that "it is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future." *Id.* at 768 (Stevens, J., dissenting).

42 *Vernonia School Dist 47J v. Acton*, 515 U.S. 646, 653 (1995).

43 *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

44 *See, e.g., Cassidy v. Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006) (Sotomayor, J.) ("[T]he prevention of terrorist attacks on large vessels engaged in mass transportation and determined by the Coast Guard to be at heightened risk of attack constitutes a 'special need.' Preventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and indeed go well beyond them."); *see also MacWade v. Kelly*, 460 F.3d 260, 272 (2d Cir. 2006).

45 *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975).

46 *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976).

47 *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search by probation officers); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (administrative search).

48 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990) (plurality op.); *see also Boyd v. United States*, 116 U.S. 616, 625-26 (1886); *City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999) (Thomas, J., concurring in the judgment).

49 494 U.S. at 267.

50 *Id.* at 273.

51 *Id.* at 274.

52 10/23/01 OLC Opinion at 28-9.

53 *Id.* at 18.

54 18 U.S.C. § 1385.

55 *See, e.g., Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau*, 13 Op. O.L.C. 195, 197 (1989) (cited and discussed in 10/23/01 OLC Opinion at 17).

56 *See Bissonette v. Haig*, 776 F.2d 1384, 1388 (8th Cir. 1985).

57 *See Chairman of the Joint Chiefs of Staff Instruction: Standing Rules of Engagement for US Forces*, Jan. 15, 2000, available at [http://www.fas.org/man/dod-101/dod/docs/cjcs\\_sroe.pdf](http://www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf). In addition to "standing" ROE, operation-specific ROE are also issued. ROE may be developed for domestic as well as overseas operations. *See also Lt. Col. Guy R. Phillips, Rules of Engagement: A Primer*, 1993 *Army Law* 4, 8. *See generally Richard J. Grunawalt, The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 *A.F.L. Rev.* 245 (1997).

58 Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 *Loy. L.A. Int'l & Comp. L. J.* 727, 741-2 (1998).

59 *Id.* at 742.

60 *Id.* at 741.

61 *Id.* at 751.

62 *Id.* at 744-45.

63 Critics might question this, citing, for example, Attorney General Janet Reno's use of deadly force against American civilians, including young children, in Waco, Texas—an incident that seems not to have damaged her standing. For example, the *New Yorker* magazine published a sympathetic profile of Reno two years after the event. *See Peter Boyer, The Children of Waco*, *The New Yorker* (May 15, 1995), available at <http://www.pbs.org/wgbh/pages/frontline/waco/childrenofwaco1.html>.

During the 51-day "siege" of the Branch Davidians in Waco, the government deployed nine Bradley fighting vehicles, five combat engineering vehicles, one tank retrieval vehicle, and two Abrams tanks. The FBI reported that a minimum of 719 law enforcement personnel were committed to being on-site during any given day of the "siege." In the fire that incinerated the Branch Davidians' compound, 76 people died—more than 20 of them children.

The government is thought to have used CS gas (orthochlorobenzyladine malononitrile) against the Branch Davidians in a manner that would have violated the instructions in an Army Field Manual, had they applied. For an account of the events and the reactions to them, *see Dean M. Kelley, Waco: A Massacre and Its Aftermath, First Things* (May 1995), available at <http://www.firstthings.com/article/2008/09/001-waco-a-massacre-and-its-aftermath--12>. But perhaps Waco was an unusual case.

64 *See Paulsen, The Constitution of Necessity, supra* n.28, at 1279 (arguing that "[a] search that might otherwise be unreasonable might become reasonable in an emergency" such as would be posed by the "danger of a nuclear bomb being detonated" by terrorists).

65 *See 10/23/01 OLC Opinion* at 34-5.

66 293 F.3d 855 (5th Cir.), cert. denied. 123 S. Ct. 403 (2002).

67 *Id.* at 859.

68 19 Eur. Ct. H.R. 193 (1994). This is not, of course, to say that Murray can provide a rule of decision in constitutional cases in the United States. *See Robert J. Delahunty & John C. Yoo*, 29 *Harv. J. L. & Pub. Pol'y* 291 (2005).

69 19 Eur. Ct. H.R. at 234.

70 Section 1 of Article 8 guarantees the "right to respect for [one's] private and family life, his home and his correspondence." Section 2 states that there shall be no interference by a public authority with this right "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or [in certain other cases]." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended.

71 For example, it would be instructive to discover whether President George Washington considered it necessary or advisable to seek search or arrest warrants when leading federal forces in suppressing the Whisky Rebellion in Pennsylvania in 1794. This episode occurred only three years after the ratification of the Fourth Amendment, and became "a precedent for all future use of federal military force in domestic disorders." Stephen I. Vladek, *Emergency Power and the Militia Acts*, 114 *Yale L.J.* 149, 162 (2004). Washington's most recent scholarly biographer states that the federal forces (under Colonel Henry Lee) "rounded up some 150 alleged rebels—many were dragged from their homes in the middle of the night." John Ferling, *The Ascent of George Washington: The Hidden Political Genius of An American Icon* 337 (2009).

The leading roles played by two pre-eminent Founders—George Washington and Alexander Hamilton, who accompanied him on the campaign—in putting down the rebellion give great weight to the precedent in determining whether the Fourth Amendment is applicable in this context. The statute under which Washington acted, the Calling Forth Act of May 2, 1792, ch. 18, 1 Stat. 264, was enacted by the Second Congress. Sections 1-2 vested the authority in the President to call out the militia in certain emergencies, and sections 3-8 prescribed detailed rules to be followed during their deployment. (For example, section 3 required the President to order insurgents to disperse before using force against them.) But nothing in the statute indicated any need to seek or obtain search or arrest warrants; indeed, given that section 2 became operative when the execution of federal law was obstructed "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings," it might have been impossible to obtain warrants from local federal (though perhaps not state) magistrates. Furthermore, the Supreme Court construed section 9 of the same statute, relating to federal marshals, to demonstrate Congress' early approval of *warrantless* arrest authority. *See United States v. Watson*, 423 U.S. 411, 420 (1976) ("The Second Congress thus saw no inconsistency between the Fourth Amendment and legislation giving United States marshals the same power as local police officers to arrest for a felony without a warrant"). *But see Thomas Y. Davies, Recovering the Original Fourth Amendment*, 98 *Mich. L. Rev.* 547, -- n.171 (1999).

