Has the U.S. Constitution Been Lost to Military Rule?

By Todd Pierce

On October 23, 2001, the Office of Legal Counsel issued a legal opinion that would shock most Americans if they realized its full implications. By all appearances, it is still in effect, judging by military surveillance operations taking place in the U.S. by the Department of Defense and the military command within it, the National Security Agency (NSA). The opinion was entitled: Authority for Use of Military Force to Combat Terrorist Activities within the United States (emphasis in original).[1]

What is the Office of Legal Counsel—or "OLC" for short—that made such a bold move? It is a secretive office in the Department of Justice. The purpose of the OLC is straightforward. It sits as a de facto court within the White House that decides the legal questions that set the boundaries for how the federal government runs day-to-day. Be they the highest presidential appointee or lowliest bureaucrat, a government official who complies with the OLC's opinion is generally immune from later prosecution or liability.

They are immune, that is, unless the OLC attorney was giving "good faith legal advice" when, in fact, the lawyers were just following orders to "legalize" an otherwise criminal act. That "good faith legal advice" would not then serve to protect their clients. Lawyers can't assist with committing crimes, but if they do––even OLC lawyers––they can be prosecuted when they knowingly help plan or commit a crime. In fact, a lawyer was prosecuted at Nuremberg for his role in committing war crimes.

Street art by DALest.
Photo: Allison Brown

The lawyers who wrote the OLC opinion about the use of military force within the United States were Robert Delahunty, now teaching "law" at St. Thomas University

Law School, Minneapolis, and John Yoo, who is back teaching the same sort of law at Boalt Law School, University of California, Berkeley. By "the same sort of law" is meant their idiosyncratic belief that the President, acting as "Commander in Chief," has dictatorial-like powers.

This is the "unitary executive theory"—a radically un-American, unconstitutional and extra-legal ideology that former Vice President and torture enthusiast Dick Cheney has been pushing since the Iran-Contra Affair. In other countries, but particularly Germany from 1933 to 1945, in which citizens lived under a dictatorship, this was called "prerogative" government, as described by German Jewish lawyers. Both Delahunty and Yoo continue working to shoehorn this radical legal theory into respectability with prolific writing of law review articles promoting it.

The argument was that because of these prerogative powers, the President was subject to no law—neither constitutional law nor international law. The October 23, 2001 opinion is particularly dangerous, as it essentially granted the President martial law authority, meaning the authority to act outside the Constitution. To reiterate, the conclusion the OLC drew was that the President has constitutional authority to use the armed forces in military operations against those deemed to be terrorists within the United States. Consequently, "these operations generally would not be subject to the constraints of the Fourth Amendment, so long as the armed forces are undertaking a military function." This is a frightening prospect, since the Fourth Amendment is what protects us against unreasonable searches and seizures, which can lead to arbitrary arrests.[2]

Furthermore, according to Delahunty and Yoo, terrorists operate within the continental United States and "conceal themselves within the domestic society and economy," which makes it difficult to identify them. By this logic, everyone is now "suspect." Furthermore, they wrote, 9/11 created a situation "in which the battlefield has occurred, and may occur, at dispersed locations and intervals within the American homeland itself. As a result, efforts to fight terrorism may require not only the usual wartime regulations of domestic affairs, but also military actions that have normally occurred abroad."

This opinion by Delahunty and Yoo formed a legal basis for a state of martial law which the Bush administration took to mean that they could fight a "war" against terrorism outside the U.S. Constitution but inside the U.S. geographic area as a "military state," operating just the way paragons of legality Mubarak's Egypt and Pinochet's Chile did. Bush officials argued this was due to necessity, but in fact that was fallacious, as the U.S. military is not, and should not be, considered an antiterrorist force. Militaries exist to defend against foreign armies attacking, not to conduct the police work required for counter-terrorism. But as we've seen, when a military takes control of a country, occupying it as in Iraq and Afghanistan, or the Israeli occupation of Palestine, it enforces martial law on the civilians living there—

in other words, the military operates as a dictatorship, or as our Supreme Court called it, “martial rule.”

So in writing an opinion authorizing martial law, Delahunty/Yoo asserted that the Fourth Amendment’s protections do not apply to domestic military operations in the United States, regardless of citizenship. They wrote that Federal Armed Forces must be free to use force when they deemed it necessary without being constrained by the Fourth Amendment, “even though force would be intentionally directed against persons known to be citizens.”

Martial law is not obvious to most people most of the time in the U.S., but military presence was evident on the streets, rooftops, and river-front in St. Paul during the 2008 RNC political convention. Military was also used for crowd control at the DNC convention in Denver that year.
Photo: Army News Service

Additionally, as a final blow against the Constitution, Delahunty and Yoo stated: "First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.'"

This OLC opinion laid the foundation for all the extra-constitutional actions by the Bush administration that would follow. They are still carried on by the Obama administration today with their assertions that the President can kill American citizens with a drone without any due process (whether inside or outside the U.S.).[3] It would also explain the military operation currently being conducted against American citizens by the National Security Agency (NSA), a component of the U.S. Department of Defense, in violation of the Fourth Amendment.

The fruits of that opinion can be seen with an out of control CIA that has been on display with the release of the Torture Report summary released by Senate Select Committee on Intelligence Chair Diane Feinstein in 2014. The acts of torture described in this summary are war crimes because they were committed in the context of, and associated with, wars beginning in 2001. But the war criminals, which could include some lawyers, may believe that there is no accountability for the perpetrators of these war crimes because they are part of, and have the protection of what Professor Michael Glennon describes as a "double government" in his book National Security and Double Government, and in an article by the same name.[4]

Glennon's book puts into print, in the open and in the so-called mainstream, what some have known for years. The CIA and other national security agencies constitute a "deep state," operating outside public view and, as we know now, without constitutional constraints or oversight.

But beyond setting the U.S. on a course of perpetual war and destroying democracy, the economy, and the Constitution, the opportunity was there for those within the deep state to protect their power even more by placing the country under "martial law." Though we don't normally see troops on the streets controlling and keeping an eye on us, and most have not felt the effects of a state of martial law, it is in effect with the constant NSA surveillance now permitted by law and the potential of military detention under Section 1021 of the 2012 National Defense Authorization Act (NDAA). Even though these statutes seem to ratify the underlying military authority put into place, that doesn't change its character as "martial law." Martial law exists whenever the military assumes authority over civilian officials. When General DeWitt ordered the removal of the Japanese Americans from the West Coast in 1942, a martial law act, that character did not change because Congress, to its later shame, ratified it by providing penalties for violating DeWitt's order.

A giant JLENS blimp will float in skies over the U.S. like one already does in Kabul. Photo: Raytheon.

In the 21st century, martial law was effectively imposed when the military (NSA) was given the military mission of surveillance of the population (us), the same mission they were given when Iraq was invaded by the U.S. and the NSA mission was to spy on Iraqi civilians. In the U.S., they were tasked to monitor all of our thoughts as expressed in our communications as if they were conducting a counter-insurgency operation. The Minneapolis antiwar activists being investigated by a grand jury is an example of what occurs when a country is under martial law, as is the persecution of Palestinian-American Rasmea Odeh for her nonviolent political activities which are critical of U.S. foreign policy in the Mideast. (It is not required under martial law that only the military enforces it—civilian law enforcement authority is used to enforce it as well.)[5]

While seeming to withdraw portions of the October 23, 2001 opinion, a 2008 OLC memo corroborates the meaning of the October 23, 2001 opinion fundamentally, but offered that "appropriate caution should be exercised" before relying on the opinion.[6] Because they are wrapped in secrecy, we have no way of knowing current interpretations, except that we know the NSA/military is still spying on us through all of our communications and Section 1021 of the 2012 NDAA is still on the books as public law, providing for military detention "pending disposition under the law of war."

For anyone skeptical that this constitutes martial law, a vigorous advocate of martial law for World War II, Charles Fairman of Harvard University, considered a martial law expert, writing in 1942, justified it, to include the removal of the Japanese Americans from the West Coast that was conducted under the military authority of General DeWitt. Fairman cited this routine aspect of martial law from World War II Hawaii: "No action should be maintained against a member of the armed forces for any act under color of duty, or against any person employed in an activity essential

to the national defense for any act within the scope of such employment; nor should such a person suffer judgment by default, or be subpoenaed as a witness."

We have seen this principle applied since 2001 in those numerous cases against various national security officials which are routinely dismissed on the grounds of "state secrets," which can be presumed to be what the torturers are relying upon.

This is not the first instance of a "dual state" in what was once considered an enlightened, democratic country. In a book of the same name, a German-Jewish lawyer, Ernst Fraenkel, wrote as the opening line in 1939: "Martial law provides the constitution of the Third Reich." Fraenkel broke German government into the "prerogative state" and the "normative state." The prerogative state constituted that part of the German state under martial law and run by the security apparatuses. Prerogative power, which Delahunty and Yoo still advocate for, is martial law, or "martial rule" as our Supreme Court once described it.

But we don't need to permit our country to fall into the abyss as Germany did, or even to be a less severe version. We do not need to give up our constitutional rights any more in exchange for "safety," knowing as we do that to suppress speech and intimidate the citizenry is really only to protect the incompetents of the deep state, who are driving the U.S. into an abyss—though different than the German example, an abyss nevertheless.

All we have to do is to demand accountability, starting with the torturers and their legal enablers, whoever they may be shown to be. Demand accountability of our government for these war crimes committed by our government, or call on international organizations and foreign nations that may be willing to assert universal jurisdiction over war crimes. That is what it took to bring war criminal Augusto Pinochet to justice. There is no statute of limitations for war crimes, so we must not give up until torturers and enablers are held accountable for what the Torture Report has shown to be war crimes. We can do no less unless we want future generations to demand of us: why didn't we do something?

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2. Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the educated Anwar Al-Awlaki was targeted and killed in a U.S. drone strike in Yemen. Also killed in the strike was Samir Khan. Al-Awlaki's 16-year-old son, Denver-born Abdulrahman al-Awlaki, was killed by American drones while attending a barbeque with cousins in Yemen the next month. For more information about the killings, see investigative journalist Jeremy Scahill's account in "Inside America's Dirty Wars: how three U.S. citizens were killed by their own government in the space of one month in 2011." (The Nation, April 24, 2013)
persons or things to be seized.
3. Amendment V provides that no citizen should be deprived life, liberty, or property without due process of law. However, in September of 2011, American-born and
4. fletcher.tufts.edu
5. For more information, see stopfbi.net and uspcn.org
6. www.justice.gov