



U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

October 6, 2008

MEMORANDUM FOR THE FILES

*Re: October 23, 2001 OLC Opinion Addressing the
Domestic Use of Military Force to Combat Terrorist Activities*

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.

It is important to understand the context of the 10/23/01 Memorandum. It was the product of an extraordinary—indeed, we hope, a unique—period in the history of the Nation: the immediate aftermath of the attacks of 9/11. Perhaps reflective of this context, the 10/23/01 Memorandum did not address specific and concrete policy proposals; rather it addressed in general terms the broad contours of hypothetical scenarios involving possible domestic military contingencies that senior policymakers feared might become a reality in the uncertain wake of the catastrophic terrorist attacks of 9/11. Thus, the 10/23/01 Memorandum represents a departure, although perhaps for understandable reasons, from the preferred practice of OLC to render formal opinions only with respect to specific and concrete policy proposals and not to undertake a general survey of a broad area of the law or to address general or amorphous hypothetical scenarios that implicate difficult questions of law.

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:

- The memorandum concludes in part V, pages 25-34, that the Fourth Amendment would not apply to domestic military operations designed to deter and prevent further terrorist attacks. This conclusion does not reflect the current views of this Office. 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. The 10/23/01 Memorandum itself concludes in part VI, pages 34-37, that domestic military operations necessary to prevent or address further catastrophic terrorist attacks within the United States likely would satisfy the Fourth

Amendment's reasonableness requirement, if the Fourth Amendment were held to apply; thus, the erroneous conclusion in part V was not necessary to the opinion.

- Part V of the memorandum also contains certain broad statements on page 24 suggesting that First Amendment speech and press rights and other guarantees of individual liberty under the Constitution would potentially be subordinated to overriding military necessities. These statements, too, were unnecessary to the opinion, are overbroad and general, and are not sufficiently grounded in the particular circumstances of a concrete scenario, and therefore cannot be viewed as authoritative.
- 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.
- 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.
- The memorandum reasons, on pages 21-22, that in the aftermath of the 9/11 attacks, the Insurrection Act, 10 U.S.C. § 333 (2000), would provide general authority for the President to deploy the military domestically to prevent and deter future terrorist attacks; whereas, consistent with the longstanding interpretation of the Executive Branch, any particular application of the Insurrection Act to authorize the use of the military for law enforcement purposes would require the presence of an actual obstruction of the execution of federal law or a breakdown in the ability of state authorities to protect federal rights.

For all of the foregoing reasons, we have concluded that appropriate caution should be exercised before relying in any respect on the 10/23/01 Memorandum as a precedent of OLC, and that the particular propositions identified above should not be treated as authoritative. We have advised the Counsel to the President, the Acting General Counsel of the Department of Defense, and appropriate offices within the Department of Justice of these conclusions.



Steven G. Bradbury
Principal Deputy Assistant Attorney General