

Unpacking the Bush administration's counterterrorism memos

On January 15, 2009 – mere days away from the end of the Bush administration – Justice Department official Steven Bradbury issued a memo that effectively retracted key legal positions that had formed the basis of the administration's counterterrorism policies. His memorandum begins simply and succinctly:

“The purpose of this memorandum is to confirm that certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001-2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office.” Bradbury noted that his office had previously withdrawn or suspended a number of these opinions, and he advised that officials “exercise caution” before relying on the remaining opinions identified by his memo.

Bradbury acknowledged that the opinions in question were penned in the heated aftermath of 9/11, and that they should be understood in that context. However, he was quick to caution that his office had not relied on the opinions since 2003, and had on several occasions acknowledged the “doubtful nature of these propositions.”

Bradbury's memo was recently declassified by the Obama administration, and was posted on the DOJ website on March 2, along with a series of post-9/11 legal opinions issued by the Office of Legal Counsel (OLC). At this point, the mere fact that Bradbury's memo exists is not particularly explosive. The story of the OLC's need to revisit and revise some of its post-9/11 legal work has already been told - largely by former OLC official Jack Goldsmith in his 2007 book “The Terror Presidency.” What is revelatory about Bradbury's memo is what he attaches to it – the legal memoranda that outlined the intellectual framework upon which the “War on Terror” was built.

The broad strokes of the administration's counter-terrorism posture have been known for some time. Aspects of the legal theories referenced by Bradbury had been leaked to the press during President Bush's first term.

Likewise, the President, Vice President, and Attorney General repeatedly and publicly made expansive claims regarding the scope of their executive powers after the 9/11 attacks. What is new in Bradbury's document release is the level of detail provided about the constitutional philosophy that guided the architects of America's response to 9/11.

The commander-in-chief power

The chief premise that is woven throughout the post-9/11 terrorism memos is the notion that the president possesses plenary war powers that the other branches of government cannot intrude upon. While the basic idea behind this assumption is uncontroversial, the extent of the war powers contemplated by the authors of the OLC memos is remarkably broad.

The memos in question were written by a handful of authors, including OLC officials Jay Bybee, John Yoo, and special counsel Robert Delahunty. Each author postulates a similarly expansive notion of presidential power, largely derived from the Commander-in-Chief Clause of the Constitution's Article II.

In his memos, Yoo consistently describes Presidential powers that are controversial, but which he characterizes as settled. His claims about the President's authority to detain U.S. citizens without court trials serve to illustrate this point. "Under the Commander in Chief Clause," Yoo writes, "the President is authorized to detain all enemy combatants, including U.S. citizens." This bold claim is made despite a lack of textual evidence in the Constitution itself, or even a coherent body of case law.

Repeated attempts to sideline Congress

The authors of the post-9/11 memos also repeatedly attempt to sideline Congress, and to deny it a role in formulating counterterrorism policy.

An April 8, 2002 OLC memo critiques a congressional attempt to introduce legislation to empanel military commissions. For background, President Bush had issued a military order in late 2001 establishing tribunals to try certain terror suspects. Since the Constitution grants Congress the exclusive power to "constitute tribunals inferior to the Supreme Court," Senator Patrick Leahy introduced a bill to grant the President limited authority to establish military commissions, presumably to resolve legal issues raised by Bush's unilateral action. The 2002 OLC memo criticizes Leahy's bill, noting that the President already possesses the power claimed by Congress.

“This legislation suffers from a number of serious constitutional defects,” the memo states. “Legislation expressly granting the President such powers is constitutionally unnecessary.”

This “go it alone” mentality has been subsequently critiqued by Jack Goldsmith and other administration insiders. By relying on overly broad assumptions of executive power, Goldsmith has noted, the President triggered legal conflicts that served to diminish his prerogatives. For example, the Supreme Court ultimately rejected presidential unilateralism with regard to military commissions when it decided the 2006 *Hamdan* case. The court’s decision effectively forced President Bush to go back to Congress to seek authority to establish military tribunals – an authority he once claimed was his own.

A presumption of constitutionality

Throughout the terror memos, John Yoo goes to great lengths to interpret existing law in a way that supports a broad view of executive power. In doing so, he turns to a common tool of legal construction: the idea that statutes should be read to avoid constitutional problems. Yoo then pushes this doctrine to its outer limits, resolving every potential constitutional conflict in favor of the executive.

An example of this approach can be found in a 2002 memo that examines the question of whether the 1971 Non-Detention Act can prevent the U.S. military from detaining American citizens as “enemy combatants.” The Non-Detention Act was passed to ensure that American citizens could not be seized under the authority of the President alone. To the contrary, the law specifies that the executive detention of U.S. citizens requires an act of Congress. The law was a product of the Watergate era, and the legislative debates of the time reveal that its supporters sought to prevent the executive from detaining American citizens unilaterally – as had been done during the Japanese internment of World War II.

In his memo, Yoo interprets the Non-Detention Act to arrive at an entirely different conclusion. The most reasonable construction of the law, he asserts, is one that “does not restrict the President’s constitutional authority as Commander in Chief to detain U.S. citizens who are enemy combatants. Any other construction would raise serious constitutional questions.”

A pliable Constitution

The most striking feature of the memos is the repeated assertion that temporal circumstances can alter the construction of the Constitution itself – particularly as it relates to the protection of individual rights. Yoo spells this out explicitly in a September 25, 2001 memo that deals with Fourth Amendment search and seizure issues:

“It seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks,” he writes. “The reasonableness of a search under the Fourth Amendment depends on the balance between the government’s interests and the privacy rights of the individual involved. As a result of the direct terrorist attacks upon the continental United States, the government’s interest has reached perhaps its most compelling level ... This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment.”

Yoo’s underlying assumption seems to be that changing circumstances can act to bolster the government’s powers, while simultaneously diminishing individual rights. He articulates this idea at much greater length in an October 2001 memo, co-authored with Robert Delahunty. In examining the question of whether the Fourth Amendment’s protections against unreasonable searches and seizures apply to military operations conducted inside the United States, the authors reach some surprising conclusions:

“In light of the well-settled understanding that constitutional constraints must give way in some respects to the exigencies of war, we think that the better view is that the Fourth Amendment does not apply to domestic military operations.” Going even further, the authors assert that speech and assembly rights might also be necessary casualties of war. “First Amendment speech and press rights,” they assert, “may also be subordinated to the overriding need to wage war successfully.”

In Steven Bradbury’s OLC memos, he singles out these specific assumptions for pointed review. Bradbury notes that the Yoo/Delahunty analysis – particularly its assertions about the First Amendment and Fourth Amendment – “should not be treated as authoritative for any purpose.”

Aftermath

By the end of President Bush's first term, many of the OLC officials who had crafted the initial "War on Terror" opinions had left the administration's employ. Jay Bybee became a Ninth Circuit Appellate Judge. John Yoo and Robert Delahunty departed for academia – Yoo to the University of California, Berkeley, and Delahunty to Saint Thomas School of Law in Minneapolis. By 2004, Jack Goldsmith was busy revising their previous work, although his changes were strongly resisted by David Addington, the counsel for Vice President Cheney.

In recent interviews, the Vice President has continued to defend many of the suppositions that underscored the early OLC memos. In December of 2008, Cheney told Chris Wallace of Fox News that "given the kind of conflict we're faced with today, we find ourselves in a situation where I believe you need strong executive leadership. What we did in this administration is to exert that kind of authority." Despite Cheney's unbowed stance, the OLC's retraction of key Bush-era terrorism opinions marked a clear departure from the administration's previous positions on executive power.

Jay Bybee's 2002 memo dealing with domestic military detention ends with a single line: "Please do not hesitate to contact us if we can provide any further assistance." It is instructive to see that in the waning days of the Bush administration, such assistance appears to have been ultimately rejected.

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