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Legal Obligations: The Proper Role of White House Lawyers


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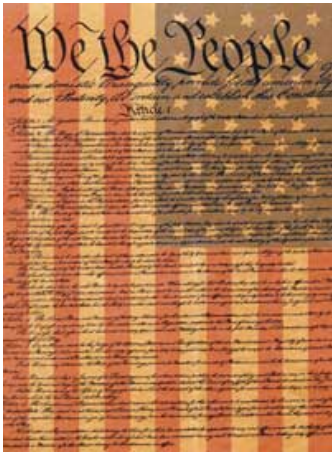
America

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Legal Obligations

The proper role of White House lawyers

[WILLIAM MICHAEL TREANOR](#) | AUGUST 3, 2009



An [opinion](#) issued on Aug. 1, 2002, by Assistant Attorney General Jay S. Bybee of the Department of Justice's Office of Legal Counsel held that the federal statute that makes it a crime to commit torture outside the United States should not be read to "apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority." The opinion further concluded that if the statute did criminalize interrogations ordered by the president, it was unconstitutional.

The memorandum, which has become known as the "torture memo," figures prominently in the ongoing public debate about whether there should be prosecutions of Department of Justice officials or a truth commission to investigate the treatment of detainees by U.S. officials. But as important as the memorandum is to any consideration of the past, it is at least as relevant to any consideration of how to ensure that in the future, the Department of Justice and the executive branch as a whole honor the rule of law and the U.S. Constitution.

Since its inception, the Office of Legal Counsel, the office that issued the torture memo, has played a critical role in ensuring that the executive branch follows the law. Operating as a kind of court within the executive branch, the office rules on the legality of potential executive branch actions. In both Democratic and Republican administrations, the office has understood its mission as making decisions that reflect the best view of the law, without regard for politics. "It is not our function to prepare an advocate's brief or simply to find support for what we or our clients might like the law to be," Ted Olson, who headed the O.L.C. during the Reagan administration, has observed. Rather, the O.L.C.'s duty is to make "the clearest statement of what we believe the law provides and how the courts would resolve the matter."

The torture memo, as well as other important Department of Justice memoranda approving counterterrorism activities, reflected a very different approach. Former Assistant Attorney General Jack Goldsmith, who rescinded the torture memo in 2004, has written that the torture memo and other opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President."

Underlying the torture memo and other memoranda was a stunningly broad theory of executive power. "In wartime," the memo states, "it is for the President alone to decide what methods to use to best

prevail against the enemy.” The memo reflects an approach under which the president even has the power to disregard statutes governing the military or the conduct of war.

This conception of presidential power is at odds with the Constitution. While the drafters of the Constitution made the president the commander in chief of the armed forces, they also gave Congress great powers in military and foreign affairs, including the power to declare war. This constitutional framework is one of shared authority, and governing judicial precedent reflects that understanding. The torture memo ignored all this as its authors single-mindedly pressed an expansive view of presidential power.

What made the torture memo and similar memos authorizing war-related actions by agents of the executive branch even more of a threat to the constitutional order and the rule of law is that they were secret. Congress had no way of knowing that the executive branch was disregarding U.S. law. There are three crucial steps needed to protect the rule of law.

First, as former O.L.C. head Walter Dellinger has suggested, the executive branch needs to adopt and make public a careful statement setting forth its conception of the proper role of the different branches of government with regard to war powers and foreign affairs. Unlike the torture memo, that statement should reflect the balance of congressional and executive power embodied in the Constitution’s text, structure and history, as well as judicial precedent. Such a statement would establish a framework for future decision-making. It would help avoid the result-oriented and crisis-driven reasoning reflected in the torture memo, and, by being made public, it would facilitate a needed public debate by allowing Congress the opportunity to respond to the executive branch’s conception of its role.

Second, there is a need for greater transparency. While concerns about the protection of classified information are important, Congress cannot defend its powers if it is unaware of what the executive branch is doing. A mechanism for informing Congress while protecting classified information must be established. Dawn Johnsen, President Obama’s pick to head the Office of Legal Counsel, has argued passionately during the past few years for the O.L.C. to return to its traditional role, and she has urged passage of a statute that would require the administration to notify Congress whenever it is not enforcing a law because of constitutional concerns. Senator Russ Feingold has introduced legislation embracing this approach.

Third, the O.L.C. must return to its traditional role. Its opinions must reflect straightforward analysis of the law, not advocacy, even when that legal analysis would keep the executive branch from pursuing policies it wants to pursue. The Constitution states, “the President shall take Care that the Laws be faithfully executed.” Honest O.L.C. opinions are critical if the president is to satisfy that constitutional obligation.

Our constitutional framework is a wise one. It provides for a strong national defense while it protects individual liberties and the rule of law. The lessons of the past will help us ensure that that framework is honored.

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