

COMING AFTER JOHN YOO

LS reminded me of an important point.

As soon as (or even before) Mukasey came in as AG, the OPR investigation into the legal opinions that justified the warrantless wiretapping was reopened. When it was reopened, Marty Lederman was skeptical that OPR would get very far:

According to a DOJ spokesperson, the OPR investigation will instead focus on two questions: whether DOJ attorneys "adher[ed] to their duty of candor to the court [presumably the FISA Court]"; and whether those attorneys "complied with their ethical obligations of providing competent legal advice to their client." (NOTE: "Officials said it was unlikely that either of the inquiries would address directly the question of the legality of the N.S.A. program itself : whether eavesdropping on American soil without court warrants violated the Foreign Intelligence Surveillance Act.")

[snip]

Thus, since John Yoo apparently was doing exactly what his client asked him to do, it is difficult for me to see how he could be said to have provided "incompetent" legal advice or to have breached a duty to a client who understood, and approved, exactly what the lawyers were doing.

But after an interesting discussion, he makes one caveat:

P.S. I should add that OPR might uncover information that demonstrates distinct ethical or other legal lapses – such as

a smoking gun showing that John Yoo and OLC did not really believe the advice they were giving; or evidence that OLC intentionally declined to seek the legal views of others within the Department because it knew that such views would undermine the office's desired conclusions; or evidence that DOJ and others provided fraudulent misrepresentations to telecommunications providers in order to induce their cooperation; or, of course, evidence that DOJ lawyers dissembled to the FISA Court. It would be entirely appropriate for OPR to investigate, report and condemn such conduct. I just don't quite see the value in OPM evaluating the bona fides or "competence" of OLC's legal advice.

What if, I wonder, OLC had entirely rewritten the Constitution? What if it was more than just saying (as Marty describes), "that the President has an article II authority to disregard FISA" and instead saying, "the President has an article II authority to interpret article II authority as he sees fit"? Or, as Sheldon Whitehouse described it:

1. *"I don't have to follow my own rules, and I don't have to tell you when I'm breaking them."*
2. *"I get to determine what my own powers are."*
3. *"The Department of Justice doesn't tell me what the law is, I tell the Department of Justice what the law*

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is."

Is that something that qualifies as a distinct legal lapse?

These legal opinions are—as we speak—under review. I have no clue if the sheer audacity of these opinions counts as something within OPR's mandate. But they may well rise to that level.