OBAMA ADMINISTRATION NOT MEETING TRANSPARENCY STANDARD SET BY BUSH LAWYER STEVEN BRADBURY

Glenn Greenwald has a great post on the Administration's refusal to say whether it can kill Americans inside the US. But he misstates how extreme Obama's refusal to share Office of Legal Counsel memos is. That's because he equates an Administration sharing OLC memos with the intelligence committee and sharing them with the public.

> Critically, the documents that are being concealed by the Obama administration are not operational plans or sensitive secrets. They are *legal* documents that, like the leaked white paper, simply purport to set forth the president's legal powers of execution and assassination. As Democratic lawyers relentlessly pointed out when the Bush administration also concealed legal memos authorizing presidential powers, keeping such documents secret is literally tantamount to maintaining "secret law". These are legal principles governing what the president can and cannot do — purported law — and US citizens are being barred from knowing what those legal claims are.
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> [snip]
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> You know who once claimed to understand the grave dangers from maintaining secret law? Barack Obama. On 16 April 2009, it was reported that Obama would

> announce whether he would declassify and release the Bush-era OLC memos that authorized torture. On that date, I wrote: "today is the most significant test yet determining the sincerity of Barack Obama's commitment to restore the Constitution, transparency and the rule of law." When it was announced that Obama would release those memos over the vehement objections of the CIA, I lavished him with praise for that, writing that "the significance of Obama's decision to release those memos — and the political courage it took — shouldn't be minimized". The same lofty reasoning Obama invoked to release those Bush torture memos clearly applies to his own assassination memos, yet his vaunted belief in transparency when it comes to "secret law" obviously applies only to George Bush and not himself.

But it is not the case that Bush always sat on OLC memos. In fact, as Dianne Feinstein noted in John Brennan's confirmation hearing, at least by the last year of the Bush Administration, Democrats had gotten Steven Bradbury to start turning over even the most sensitive OLC memos to Congress.

> I wanted to talk about, just for a moment, the provision of documents. Senator Wyden and others have had much to do about this. But our job is to provide oversight to try to see that the CIA and intelligence communities operate legally.
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> In order to do that, it is really necessary to understand what the legal — the official legal interpretation is. So the Office of Legal Counsel opinions becomes very important.
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> We began during the Bush administration with Mr. Bradbury to ask for OLC opinions. Up til last night, when the

> president called the vice chairman, Senator Wyden and myself and said that they were providing the OLC opinions, we have not been able to get them. It makes our job to interpret what is legal or not legal much more difficult if we do not have those opinions.

Which made it possible to — as DiFi did in an exchange with Michael Mukasey on April 10, 2008 — force the (Bush) Administration to publicly disavow some of the more extreme positions endorsed by John Yoo.

[youtube]CKKQd5DkB0A[/youtube]

> DiFi: Is this memo in force? That the Fourth Amendment does not apply in domestic military.
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> Mukasey: The principle that the Fourth Amendment does not apply in wartime is not in force.
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> DiFi: No. The principle that I asked you about? Does it apply to domestic military operations? Is the Fourth Amendment, today, applicable to domestic military operations?

And this, in turn, appears to have led to DOJ actually withdrawing the memo in question in October 2008.

In other words, because Acting OLC head Steven Bradbury shared OLC memos with Congress, they were able to push back against truly unreasonable (heh) claims.

Just one question after DiFi had pointed out that — after the excesses of the Bush OLC became known, OLC started provided Congress with even the most sensitive memos, whether or not they declassified them for public review (and as I understand it, Senators had easier access to the memos than Representatives) — Brennan pretended that it was highly exceptional to share any OLC memos.

> BRENNAN: (inaudible) Chairman, I understand fully your interest in having your staff have access to this documentation – fully understandable. The reason for providing information just to committee members at times is to ensure that it is kept on a limited basis. It is rather exceptional, as I think you know, that the Office of Legal Counsel opinion – or advice would be shared directly with you.
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> BRENNAN: And this, I think, is – was determined because of the rather exceptional nature of the issue and in a genuine effort to try to meet the committee's requirements. I – I understand your interest in having the staff access to it…
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> (CROSSTALK)
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> FEINSTEIN: If you would relay the request…
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> BRENNAN: Absolutely.
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> FEINSTEIN: … officially, we'd appreciate it very much. [my emphasis]

Brennan simply ignored DiFi's point – that at the end of the Bush Administration OLC had adopted a new standard – and pretended that any request to share memos with Congress was highly unusual.

Like Greenwald, I think the Administration should share memos affecting such weighty matters as the President's authority to unilaterally kill someone. But that's not even what we're talking here. We're talking about Obama's refusal to even meet the standard adopted at the end of the Bush White House.

Note, too, that we seem to have come full circle, given that the targeted killing OLC memo in question once again takes a swipe at the Fourth Amendment.

> The Fourth Amendment "reasonableness" test is situation-dependent. Cf Scott, 550 U.S. at 382 ("Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"'). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," Garner, 471 U.S. at 8- the interests in protecting the lives of Americans.

As I noted, this is one passage of the white paper where the distinction between AUMF and Article II collapses, effectively adopting a Fourth Amendment exception for "enemy forces" even if the operation in question is not a military one. That's not John Yoo territory (there are far more troubling aspects to this white paper).

But it is an example of how both Bush's Administration and Obama's have tried to chip away at foundational rights by refusing to even tell Congress what they're doing.

The Bush Administration, to its credit, started becoming more open as the extent of its abuses

became known. The Obama Administration, however, now refuses to sustain the standard set in the wake of those abuses.