

## The Post-9/11 Fix

Four legal observers propose repairs to America's national security network.

### SPLIT UP DUELING ROLES OF OLC

BY NEAL KATYAL

**W**hen I served at the Justice Department in the last administration, I came to believe that the advisory and adjudicatory roles of the department's Office of Legal Counsel should be split. In the wake of the horrible 9/11 attacks, this division is essential.

The OLC today is hopelessly compromised: It has to advise the president on a host of sensitive matters, but it must also be the judge of legal issues within the executive branch. Because many of the most serious issues, particularly national security matters, never reach the courts, the OLC effectively has the last word on many of them. Yet the OLC's need to advise compromises its ability to judge.

In a forthcoming *Yale Law Journal* article, I discuss how we should be thinking much more about internal separation of powers (*within* the executive branch), rather than external separation of powers (between the branches). One part of that story concerns the OLC, for its two roles as adviser and adjudicator are in fundamental tension. Quite simply, no one wants an adviser who has ruled against him as an adjudicator. The upshot is an OLC that is too tempted to tell the president what he wants to hear.

Over the past five years, the OLC's track record has been abysmal. The OLC said that military commissions to try alleged

terrorists were legal, but the Supreme Court strongly disagreed. The OLC claimed that federal courts have no habeas jurisdiction over Guantánamo Bay detainees; the Court said that was wrong, too. The OLC said that the Geneva Conventions' most rudimentary requirements did not apply to the war on terror, but the Court rejected that. The OLC apparently said that U.S. citizens could be detained indefinitely without due process, but the Court said it was wrong again. The office has also poorly analyzed domestic electronic surveillance of Americans and torture of detainees. Perhaps the only issues the OLC has gotten right, in the loosest sense of the term, are those it has managed to keep out of the courts thus far.

Executive officials are bound to disagree on tough questions. As secretary of state, Colin Powell was strongly opposed to the OLC's view of the Geneva Conventions, while some in the Defense Department supported it. Disagreement is healthy, for agencies should be willing to push the law and avoid ossification when necessary. But agencies need to seek adjudication of these debates. And that has to come from a neutral decision maker, not a pep squad for one side.

In resolving these interagency disputes (and performing other functions), the OLC prides itself on its independent judgment and expertise. When its high-ranking officials become advocates, as they did in many of the relevant decisions, the system breaks down. The OLC begins to look suspect, resembling a courtroom flush with political influence rather than law.

Yet the political pressure on the OLC is unavoidably immense. The head of the office and all its deputies are politically appointed. They are expected to advise the president and are regularly present at White House meetings. And in this climate, there is simply no way that the OLC's aspiration to be a neutral decision maker can be met. Simply put, its officials are lawyers with a client to serve.

The OLC's practice of issuing written opinions is not an office conceit; it reflects the underappreciated fact that in resolving disputes, the OLC is supposed to act as a court. The client-driven advisory function, however, dominates this other role. The trend in the government has been to split the litigation function from the advisory function (so that there is no longer a solicitor general who both litigates and advises). Similarly, a split between the advisory and adjudicatory functions of the OLC is necessary.

The OLC should be stripped of its adjudicatory role and per-

mitted to function only as an adviser to the administration. OLC attorneys would help trouble-shoot legislation, research discrete areas of law, and provide their best judgment on legal issues.

The task of resolving interagency disputes should be transferred to a separate official (a proposal spelled out in greater detail in my forthcoming *Yale Law Journal* article.) The official would hold tenure for a four-year period that straddles presidential terms, subject only to removal for cause.

Fixing the OLC is not the last word. Even more must be done to encourage better decision-making, including more effective checks and balances, within the bureaucracy. That is the task for policy-makers and academics in the wake of 9/11.

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*Neal Katyal is a law professor at Georgetown University Law Center. He argued Hamdan v. Rumsfeld (2006), which struck down the military tribunals at Guantánamo Bay, Cuba.*