

*New Federal Initiatives Project*

**Office of Legal Counsel Releases  
Opinions**

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## Office of Legal Counsel Releases Opinions

On March 1, 2009, the Department of Justice released nine opinions rendered by the Office of the Legal Counsel during the Bush administration. The opinions concerned the legality of various steps to protect the nation after 9/11. One of the opinions, styled “Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001,” and written by Steven Bradbury, Deputy Assistant Attorney General Office of Legal Counsel, on January 15, 2009, revoked the analysis of some of the prior opinions released on March 1. The January 15, 2009 memorandum opined: “that certain propositions stated in several opinions issued by the Office of Legal Counsel 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.” But the memorandum also states that it is “not intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility.”

The actions of the Bush administration in repudiating a large number of opinions and the Obama administration in releasing them publicly were both highly unusual. While OLC on occasion has overruled OLC opinions of previous administrations and even OLC opinions of its own administration, there have been few, if any, occasions where it overruled so many. Moreover, in the past OLC has overruled opinions only in opinions that are themselves full length opinions. The January 15 memo often overrules previous opinions in a summary fashion, although in some cases it refers to previous memoranda where more comprehensive analysis justifying the overruling may be available. It is possible that the Office of Legal Counsel acted in this unusual fashion, because the previous opinions whose reasoning was at least in part repudiated were themselves unusual. As the January 15 memo states, these past opinions “represent a departure from this Office’s preferred practice of rendering formal opinions addressed to particular policy proposals and not undertaking a general survey of a broad area of law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.”

The release of these opinions by the Obama administration is no less unusual. The Office of Legal Counsel generally declines to release opinions on such sensitive matters. This decision may reflect a commitment to greater openness. Such transparency can have advantages in that it will encourage substantial care in the production of opinions. It has two potential disadvantages. First, automatically releasing opinions on sensitive matters may encourage those opinions to be written with a greater view toward public relations. Such a focus can come at the expense of rigorous analysis and may lead the office to shrink from expounding unpopular legal opinions, even those mandated by law. Second, the certainty that sensitive opinions will be released may discourage other agencies from seeking the office’s opinion. The latter consequence would detract from rather than reinforce the enforcement of the rule of law within the executive branch.

### **Related Materials:**

The nine released opinions:

- Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, January 15, 2009  
<http://www.fas.org/irp/agency/doj/olc/olc011509.pdf>
- Memorandum Regarding Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches, September 25, 2001  
<http://www.fas.org/irp/agency/doj/olc/amend-fisa.pdf>

- Memorandum Regarding Authority for Use of Military Force to Combat Terrorist Activities within the United States, October 23, 2001  
<http://www.fas.org/irp/agency/doj/olc/milforce.pdf>
- Memorandum Regarding Authority of the President to Suspend Certain Provisions of the ABM Treaty, November 15, 2001  
<http://www.fas.org/irp/agency/doj/olc/suspend-abm.pdf>
- Memorandum Regarding the President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations, March 13, 2002  
<http://www.fas.org/irp/agency/doj/olc/transfer.pdf>
- Memorandum Regarding Swift Justice Authorization Act, April 8, 2002  
<http://www.fas.org/irp/agency/doj/olc/swift-justice.pdf>
- Memorandum Regarding Determination of Enemy Belligerency and Military Detention, June 8, 2002  
<http://www.fas.org/irp/agency/doj/olc/belligerency.pdf>
- Memorandum Regarding Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens, June 7, 2002  
<http://www.fas.org/irp/agency/doj/olc/detention.pdf>
- Memorandum Regarding October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities, October 6, 2008  
<http://www.fas.org/irp/agency/doj/olc/caution.pdf>