

## Will Bush's Secret Legal Memos Be Released?

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Last week, President Barack Obama [formally repudiated](#) certain counterterrorism tactics, including coercive interrogation, that his predecessor's administration had gone out defending.

Said Dick Cheney in one parting television interview touching on aggressive interrogation: "[I can't claim perfection](#)," but "I can tell you that we had all the legal authorization we needed to do it, including the sign-off of the Justice Department."

Then-President Bush put it more simply. He told CNN's Larry King, "I got legal opinions that said [whatever we're going to do is legal](#)."

They were talking about legal analyses generated by the Justice Department's Office of Legal Counsel, a small but powerful corps of lawyers who give "[authoritative legal advice](#)" to the executive branch. OLC opinions, or "memos," effectively tell executive agencies, including the military, what they may or may not do as a matter of law. Questionable conduct backed by a favorable OLC memo will almost always pass muster. In other words, OLC memos serve as law in the executive branch.

But Bush and Cheney neglected to mention that many OLC memos assessing their strategies for interrogation, detention, surveillance and prosecution [remain secret](#). With an ardent advocate of government openness -- and critic of Bush policies -- slated to take over the OLC, however, people may soon know more.

Some of the memos are by now well-known, for example the August 2002 memo that [narrowed the definition of torture](#). But many counterterrorism-related OLC memos, including all those addressing the administration's [domestic warrantless wiretapping program](#), still haven't been released.

ProPublica has compiled the [first interactive list of these crucial records](#) -- missing and known.

These memos laid the legal foundation to many of Bush's most criticized counterterrorism efforts -- the claims of unilateral executive authority to surveil, detain, and try terrorism suspects, unfettered by Congress or international law. Their disclosure could reveal what move was considered when, why and at whose behest.

[Dawn Johnsen](#), a liberal constitutional law professor, has been nominated by Obama to take over the OLC. She has publicly ripped the Bush OLC for its secrecy, accusing it of "[a terrible abuse of power](#)" by its "[practice of making and relying on secret law](#)." (Johnsen's confirmation is not yet scheduled.)

Her comments carried credibility, as she'd served for five years in Bill Clinton's OLC including as its chief. She decried that the public learned of "extreme" interrogation and secret overseas prisons "only because of government leaks" and "years late." That the Bush administration "continues to withhold other memos," she wrote, [demands "outrage."](#)

On Wednesday, ACLU attorneys sent acting Assistant Attorney General David Barron a letter asking

the DOJ to release the memos. (Asked by ProPublica when or whether the still-secret memos will be released, a Department of Justice spokesperson declined to comment.)

The Bush administration withheld the memos, its lawyers have said in court filings, on national security grounds and to protect internal confidentiality. Even after warrantless domestic wiretapping had been publicly exposed, then-Assistant Attorney General Peter Keisler told one federal judge in an ACLU [FOIA suit](#), disclosure of OLC memos on the subject could "cause exceptionally grave damage to the national security."

These can be legitimate grounds for avoiding Freedom of Information Act disclosure requirements. Courts typically decide FOIA exemption claims on a document-by-document basis, sometimes reviewing classified information in private but sometimes deferring to the government's claim that the contents must remain a protected state secret. Some of the Bush OLC's claims of FOIA exemption have already been approved by judges, but the ACLU is asking that the new administration reconsider all such positions in the new [spirit of disclosure Obama embraced](#) last week.

Bush's arguments for confidentiality ranged from attorney-client privilege to "[executive privilege](#)" to the "deliberative process privilege" -- which protects free discussion among policymakers before a final decision is made -- to the attorney work-product privilege, which shields strategizing done by a lawyer for litigation purposes.

Johnsen herself has said that some OLC advice should not be disclosed. National security classification can be warranted, she said in a statement of [OLC guiding principles](#) co-published with other alumni (several returning under Obama) shortly after exposure of the so-called torture memo. To encourage agencies to seek to avoid unlawful conduct, she said, "OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action."

But the presumption should be "transparency," Johnsen said, and exceptions should be construed narrowly. The Bush OLC's secrecy, said Johnsen, had disabled Congress and the courts from checking executive-branch "overreaching or abuses," for the simple fact that they "do not know what the executive branch is doing."

National security should trump disclosure only in "extreme cases," she told a Senate Judiciary subcommittee last April, and can be satisfied by limited redactions of "factual details" or "some delay." She will now have the chance to decide, with an insider's view of the stakes, whether the Bush administration's decisions to withhold made sense.

Besides being antidemocratic, some have argued, OLC secrecy is dangerous for practical reasons: It could permit conduct based on faulty premises. The August 2002 "[torture memo](#)" was among a number written around that time that were "deeply flawed" and "sloppily reasoned," according to Jack Goldsmith, who helmed Bush's OLC from October 2003 to June 2004 and then wrote [a book about it](#).

[Marty Lederman](#) -- an OLC alumnus who is returning as Johnsen's deputy -- has said that had the memo been exposed to public scrutiny before it was leaked (and then rescinded) in 2004, "it would not have taken more than two years for the Office to make much-needed corrections."

OLC opinions on warrantless wiretapping could prove certain criminal or immigration proceedings to have been "tainted," says ACLU attorney Melissa Goodman. It is "impossible to tell" which of the withheld memos would be most revealing, but among those she is eager to see based on vague

descriptions in government court papers: a Jan. 9, 2001, memo that seems to discuss the legality of the government's warrantless wiretapping program, and a Feb. 25, 2003, memo addressing the "potential use of certain information collected in the course of classified foreign intelligence activities."

Even if the Obama administration releases the Bush OLC memos, the clamor from critics is unlikely to end. Says Jameel Jaffer, director of the ACLU's National Security Program, the memos are important to seeking "accountability" for those who "purported to justify conduct that the U.S. once prosecuted as war crimes." Some scholars and advocates have called for [investigation](#), if not [prosecution](#), of the Bush OLC lawyers' role in what they call human rights violations.

The Justice Department's Office of Professional Responsibility is [investigating the lawyering](#) behind Bush interrogation policies for conduct falling below agency standards. NYU law professor Stephen Gillers, an expert on legal ethics and the discipline of lawyers, has said the [interrogation-related OLC memos](#) produced by Jay Bybee, who headed the OLC for two years until November 2003, and his deputy, John Yoo, "are an abysmal piece of work" and [should be found deficient](#).

Asked yesterday to comment on the criticisms and investigation of his work, Yoo said, "I really cannot directly address your questions on the record." He said that pages 165 to 204 of his book, [War by Other Means](#), spoke to these issues. (Bybee did not respond to a request for comment forwarded by a spokesperson for the U.S. Court of Appeals for the Ninth Circuit, where Bybee is now a judge.)

Two veterans of the OLC, from the Bush Sr. and Clinton administrations, have slammed Yoo and Bybee's critics. In a commentary for *American Lawyer*, Jeffrey Shapiro and Lee Casey wrote that the memo's authors properly answered the specific legal questions they were asked rather than expound on policy or morality. They called Giller's criticisms "personal" and "completely unpersuasive."

So far the Obama administration hasn't committed to disclosing the withheld memos, much less pursuing next steps. Attorney General nominee Eric Holder was circumspect when asked by Republicans on the Senate Judiciary Committee whether favorable OLC opinions would shield a government actor from liability. It would matter whether the opinion was "appropriately and in good faith drafted," he said in his confirmation hearings. If Holder is confirmed, as is generally expected, the OPR investigators will answer to him.

Johnsen has said, "Questions of atonement and remedy and prevention" [can only be answered with "transparency](#) [24] about the wrong committed" -- with "full disclosure."

See [ProPublica's interactive chart of the Bush administration's still secret memos](#).

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