OPINION

■ SECRET DOCUMENTS

Why classify legal memos?

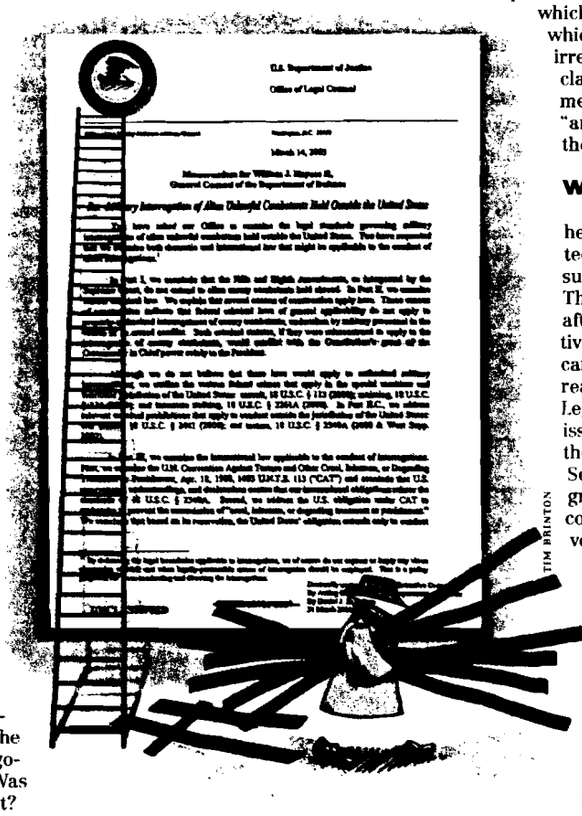
By Louis Fisher SPECIAL TO THE NATIONAL LAW JOURNAL

ON MARCH 14, 2003, John Yoo of the U.S. Department of Justice issued a memo explaining the legal principles for interrogating suspected terrorists. On March 31, 2008, it was declassified and publicly released. If it consisted of legal reasoning alone, why was it classified? A society cannot remain faithful to the rule of law when governed by secret legal memos, especially those that promote broad and unchecked presidential power.

Yoo's memo is entitled: "Military Interrogation of Alien Unlawful Combatants Held Outside the United States." At the bottom of the first page appears this notation: "Declassify under authority of Executive Order 1958 By Acting General Counsel, Department of Defense By Daniel J. Dell'Orto, 31 March 2008." What is "Executive Order 1958"? The series of numbered executive orders currently exceeds 13,000. Is 1958 a date? A typo? Was it supposed to be 12958, the executive order that covers classified national security information? The notation is remarkably casual and slapdash.

Who originally classified the memo, and why? Without the name of the classifier there is no accountability. Executive order 12958, as amended, states that part of the steps in classifying a document is to provide "a concise reason for classification that, at a minimum, cites the applicable classification categories" identified in the order. Was that ever done? If so, who did it?

The agency originating the document "shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified." Nothing in the Yoo memo indicates compliance with that requirement. The director of the Information Security Oversight Office (ISOO) "may grant waivers of this requirement." Was there a waiver? Did the director even know of the Yoo memo? Decisions to classify and declassify require accountability, and thus far we have no evidence of how and why the Yoo memo was classified.


U.S. Department of Justice
Office of Legal Counsel

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The executive order explains when it is improper to classify a document. In no case shall information be classified in order to "conceal violations of law, inefficiency, or administrative error." The Yoo memo encouraged and sanctioned violations of statutes and treaties. No information shall be classified to "prevent embarrassment to a person, organization, or agency." The Yoo memo might have been classified to avoid embarrassment to the CIA and the Bush administration. The executive order states that no information shall be classified to "prevent or delay the release of information that does not require protection in the interest of the national security." No reference is made in the memo to anything that looks like sources or methods, the standard justification for classification. If such material existed, it could have been redacted and the balance of the memo made public.

At a hearing on April 30, 2008, before the Senate Judiciary Committee, several experts testified on the scope and purpose of secret law and the harm it does to constitutional government. One witness was J. William Leonard, former ISOO director. He told the committee that the declassified Yoo memo "represents one of the worse abuses of the classification process" that he had seen during his 30-year federal career. He made these points about the memo: It is "purely a legal analysis," and therefore there was no basis to have it classified; whoever classified it "had either profound ignorance of or deep contempt for the process" set forth in executive orders; it did not contain the identity of the official who classified it; the person who classified it did not indicate which portions are classified and which are not; and "it is exceedingly irregular" that this memo was declassified by the Defense Department even though it was written "and presumably classified" by the Justice Department.

Why hide legal reasoning?

Legal memos are legitimately held secret when needed to protect national security interests, such as identifying a covert agent. They can be easily made public after redacting names and sensitive references. No plausible case can be made for withholding legal reasoning. Certainly the Office of Legal Counsel did not hesitate to issue its Jan. 19, 2006, defense of the highly controversial National Security Agency surveillance program, which the administration continues to regard as such a covert operation that it treats the program as a "state secret" and has sought to withhold any information in litigation.

Secret legal memos are particularly damaging to the rule of law when they build on untested theoretical definitions of presidential power. At various places in his memo, Yoo championed broad and inherent executive prerogatives in foreign affairs and war. Such a reading undermines constitutional limits because it encourages the view that when the president acts under Article II and invokes inherent powers, conflicting statutes and treaties may be ignored. The rule of law is further weakened when memos remain secret without the opportunity for colleagues to determine compliance with legal and constitutional standards. Secrecy makes vetting within the executive branch minimal.

Under Yoo's interpretation, there is no rule of law. Government functions by fiat. The dominant force is not law or statute or treaty—it is executive will over democracy and representative government. Over the years, unchecked presidential power has regularly weakened, not strengthened, national security. The public (and executive agencies) cannot comply with law if it is hidden and unknown. NLJ

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