

Post-9/11 memo argued for unlimited presidential war-making powers

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A newly released memo from the Justice Department, written shortly after the attacks of September 11, 2001, argued for the unlimited war-making powers of the president. The memo sought to create a pseudo-legal justification for launching a “preemptive” war against any country, even those such as Iraq that were in no way connected with the terrorist attacks.

The memo was recently posted without notice on the Justice Department’s web site. It was first reported by *Newsweek*’s Michael Isikoff in an article published December 18 on the magazine’s web site. The title of the memo (“The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them”) had been previously released, but its contents were unknown until this week.

One of the main conclusions of the memo, dated September 25, 2001, is that “the President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.”

This finding was made amidst ongoing debate within the administration as to whether Afghanistan or Iraq should be the country that would be first on the list of targets in the so-called “war on terrorism.” It is a clear indication that immediately after the terror attacks the Bush administration was planning to exploit them to launch preemptive wars against Iraq or any other country it chose.

The decision to launch the war lay solely in the hands of the president, the memo argued: “In the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.”

The memo was written by John Yoo, then deputy assistant attorney general in the Office of Legal Counsel, the legal arm of the Justice Department. Yoo has been one of the chief proponents of granting unlimited powers to the president, using the attacks of September 11 as a pretext. He was among a coterie of right-wing lawyers in the Justice Department, the White House and the Defense Department

that has manufactured justifications for indefinite detention without charges, military tribunals and the scrapping of the Geneva Conventions as applied to the “war on terror” and torture.

Yoo wrote the memo at the behest of White House Chief of Staff Alberto Gonzales, slated to be attorney general under Bush’s second term. The main impetus for this memo and all those subsequently written came directly from the White House, spearheaded by Gonzales and his deputy, Timothy Flanigan. Gonzales’s move to the top position in the Justice Department is a clear sign that the White House will continue to press for the dictatorial powers argued for by these lawyers.

Much of the memo consists of various examples in the history of the United States in which the decision to launch a war was made by the executive branch, without authorization from Congress. It concludes: “The Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.”

The memo dismissed the argument that the constitutional authority vested in Congress to declare war limits in any way the president’s power to deploy armed forces abroad at his discretion and for whatever duration he felt necessary. “Declaring war is not tantamount to making war,” it states—i.e., the president can make war even if it is not declared. This interpretation is in line with American policy over the past half century, during which time the president has never sought a declaration of war from Congress before deploying the military.

Following the Vietnam War, Congress passed the War Powers Resolution (WPR), which sought to place some constraints on the president’s power to make war. Section 2(c) states: “The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent

involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

The resolution also stipulated that if the president initiates hostilities, Congress must authorize the conflict or declare war itself within 60 days. Otherwise, the hostilities must be ended. While the memo states that the executive branch has never accepted the WPR as a legally binding definition of the president’s authority to deploy its forces, it uses the third condition in section 2(c) to justify the president’s right to deploy forces anywhere in response to September 11.

Also cited by Yoo is the Joint Resolution of September 14, 2001, passed overwhelmingly by both parties in Congress, which states, “The President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Acts such as those of September 11 “continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States,” the resolution states.

However, Yoo did not think that the Joint Resolution went far enough in granting the president unlimited powers. “It should be noted here that the Joint Resolution is somewhat narrower than the President’s constitutional authority,” Yoo wrote. “The Joint Resolution’s authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states, which cannot be determined to have links to the September 11 attacks. Nonetheless, the President’s broad Constitutional power to use military force to defend the nation, recognized by the Joint Resolution itself, would allow the President to take whatever actions he deems appropriate to pre-empt or respond to terrorist threats from new quarters.”

One of the most significant passages in the memo is hidden away in a footnote. “We of course understand,” the memo states, “that terrorist organizations and their state sponsors operate by secrecy and concealment, and that it is correspondingly difficult to establish, by the standards of criminal law or even lower legal standards, that particular individuals or groups have been or may be implicated in attacks on the United States. Moreover, even when evidence sufficient to establish involvement *is* available to the President, it may be impossible for him to disclose that evidence without compromising classified methods and sources, and so damaging the security of the United States.... But we do not think that the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the President from taking such military

measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of his plenary power to use military force, the President’s decisions are for him alone and are unreviewable.”

In other words, the attacks of September 11 give the president the blanket right to launch a war against any country without providing evidence of any threat to the United States posed by that country. His decisions are for him alone, and cannot be challenged by anyone.

Entirely absent from the memo is any discussion of the application of international law. International law renders illegal precisely the acts of aggression—war launched without any proof of imminent threat—that the memo was seeking to justify.

The same basic argument—that the president has unlimited powers as commander in chief during wartime, was advanced by Yoo and others in different contexts during the following years.

In January 2002, Yoo wrote a memo along with Robert Delahunty, special counsel at the Justice Department, that argued the Geneva Conventions did not apply to the holding of prisoners in Guantanamo Bay. In particular, it argued that the president has the right to detain prisoners indefinitely and that he could appoint military tribunals to hear their cases. Similar arguments were being made at the same time by Gonzales.

A memo dated August 1, 2002, signed by then assistant attorney general Jay Bybee, but written by Yoo, argues that any restrictions that international law places on the treatment of detainees—including the prohibition of torture—may be an unconstitutional violation of the president’s authority to conduct war as commander in chief.

Before serving in the Justice Department, Yoo was a law clerk for right-wing judge Lawrence Silberman and then for Supreme Court Justice Clarence Thomas. He is now a professor at the Law School of the University of California, Berkeley, and is a visiting scholar at the American Enterprise Institute.

The full text of the memo “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them” can be found at <http://www.usdoj.gov/olc/warpowers925.htm>.



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