

OPINION

# Obama Flips Position with Prisoner Exchange

The administration vowed to scale back executive power, but the Bergdahl swap proved otherwise.

BY LOUIS FISHER

The prisoner exchange with the Taliban on May 31 has exposed a constitutional issue reminiscent of the George W. Bush era. Legal advisers to Bush asserted a host of plenary, exclusive and inherent presidential powers to sharply diminish congressional control over executive power.

In 2009, the Obama administration took steps to scale back those inflated models of presidential power. However, the prisoner exchange brings the administration full circle by insisting that a statute requiring notice to Congress before transferring detainees from Guantánamo Bay, Cuba, could not control independent presidential decisions.

Following the Sept. 11, 2001, terrorist attacks, the Office of Legal Counsel during the Bush administration issued opinions that promoted exclusive and plenary presidential power. The memos supported torture of suspected terrorists, inherent presidential author-



**TRADED:** Sgt. Bowe Bergdahl was traded for five Taliban members detained by the United States under an assertion of authority that President Obama had once opposed.

ity to create military tribunals and the National Security Council's warrantless surveillance in violation of Foreign Intelligence Surveillance Act. On Jan. 15, 2009, after Obama had taken office, the Office of Legal Counsel withdrew a number of those memos and rejected the assertion that presidents may act

free of statutory limitations.

The Bush-era opinions claimed that the power to dispose of individuals captured and held by U.S. forces remains in the hands of the president alone because the Constitution does not "specifically commit" the power to Congress. Although the Constitution

does not specifically commit that power to the president either, an Office of Legal Counsel opinion in March 2002 concluded that the treatment of captured enemy soldiers is entrusted by the Constitution in “plenary fashion” to the president, who enjoys “exclusive authority” over such detainees.

### INCONSISTENT VIEWPOINTS

In 2009, the Office of Legal Counsel found these sweeping propositions inconsistent with constitutional text. Because Article I grants significant war powers to Congress, legal opinions that categorically preclude Congress from enacting legislation concerning the detention, interrogation, prosecution and transfer of enemy combatants “are not sustainable,” the office found. The office shared its analysis with the U.S. attorney general, the White House counsel, the legal adviser to the National Security Council, the principal deputy general counsel of the Department of Defense and several offices within the Justice Department.

Five years later, the Obama administration decided it could send five senior members of the Afghan Taliban from Guantánamo to Qatar in exchange for Sgt. Bowe Bergdahl, held by the Taliban. The administration said it did not have to comply with a statute requiring the administration to give Congress 30 days notice before transferring detainees. Before making the transfer, the Defense Department sought guidance from the Justice Department, but no one in the DOJ, including the Office of Legal Counsel, has issued a legal memo to justify these transfers.

All we have in terms of legal analysis is a statement issued by the

National Security Council on June 3. An NSC representative announced it was lawful for the administration to proceed with the transfer of prisoners notwithstanding the provision of the 2014 National Defense Authorization Act that requires the administration to give Congress 30 days notice before transferring detainees from Guantánamo.

To the NSC, this section would interfere with the president’s function under the Constitution: protecting the lives of Americans abroad and protecting U.S. soldiers.

But the NSC ignored several issues: First, the release of five senior Taliban creates a risk for Americans abroad. Second, it did not acknowledge that Congress under its Article I powers also has a duty to protect the lives of Americans abroad and U.S. soldiers.

The NSC’s statement mirrors the legal reasoning adopted by the Office of Legal Counsel immediately after the Sept. 11 attacks but repudiated by that office in 2009. The NSC pointed to Obama’s statement when he signed the 2014 National Defense Authorization Act, in which he said that the act “does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles.” Under the NSC’s interpretation, the failure of Defense Secretary Chuck Hagel to provide 30 days notice under the act was lawful.

But it was not lawful. It represented a unilateral executive decision to set aside a statutory provision enacted pursuant to Congress’s constitutional authority.

The NSC did not discuss a memorandum Obama issued in March 2009,

made in reference to presidential signing statements. At the time, Obama said that signing statements should not be used to suggest that the president will disregard statutory requirements on the basis of policy disagreements. As explained in 2009 by the Office of Legal Counsel, Congress has substantial authority under Article I of the Constitution to pass legislation governing the transfer of detainees.

In addition, regarding the recent prisoner swap, nothing in the statements from the Obama administration offers any legal analysis to dismiss the authority of Congress to receive a 30 day notice on the release of detainees from Guantánamo.

If Office of Legal Counsel believes its 2009 memo is flawed and should be revised to recognize plenary presidential authority over the transfer of detainees, it has a responsibility to say so—and do that publicly.

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