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## Another Example of Shoddy Legal Reasoning

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Shoddy legal reasoning in memos the U.S. Department of Justice's Office of Legal Counsel authored in response to the 9/11 attacks are a constant focus of the news media these days. Recently, we learned that the Justice Department is investigating whether Office of Legal Counsel lawyers violated ethics rules when they issued legal opinions endorsing the use of torture. Critics, including former employees of the Bush Justice Department, have also deplored the poor quality of the legal reasoning in memos allowing the use of warrantless wiretaps. Receiving less attention, but equally important, is the question whether the problems at the Justice Department go beyond the war on terror. There are indications that they do.

At least one legally indefensible Office of Legal Counsel opinion unrelated to the war on terror remains in force, and there may well be others. The opinion in question concerns a controversial requirement of the U.S. Leadership Against Global HIV/AIDS, Tuberculosis, and Malaria Act of 2003. The "Leadership Act," which created an infrastructure for the U.S. to spend several billion dollars to fight HIV/AIDS overseas, requires all recipients to explicitly oppose prostitution. Precisely what the provision obliges grantees to do remains unclear, even after several years of litigation (in which I represent several international relief organizations challenging the constitutionality of the provision). At a minimum, however, the provision obligates them to adopt, as an organization-wide policy, the government's view on a controversial issue.

There are two primary problems with the policy requirement. First, it impedes the struggle against HIV/AIDS by limiting outreach to prostitutes, who are often by necessity at the front lines of the fight against HIV/AIDS. Already, Brazil has rejected all U.S. HIV/AIDS funds, refusing to curtail its highly successful HIV/AIDS prevention program as the policy requirement would have forced it to do. In other countries, organizations that continue to accept U.S. funding have had to terminate programs to provide job skills to help women leave prostitution, leading to the doubly distressing results that women have no choice but to keep working as prostitutes, and that the fight against HIV/AIDS is less effective.

The second problem with the policy requirement is that it violates the First Amendment's bans on compelled speech, viewpoint discrimination and the imposition of "unconstitutional conditions" on the privately funded speech in which government grantees engage. It was this aspect of the policy requirement that the Office of Legal Counsel, in its role as legal advisor to the executive branch, was called on to evaluate. Initially, the lawyers got it right. In a February 2004 opinion, they warned that

it would be unconstitutional to enforce the requirement against U.S.-based organizations. Although this opinion was apparently labeled "tentative," both USAID and the U.S. Department of Health and Human Services took it seriously enough to refrain from enforcing the Leadership Act's anti-prostitution policy requirement against U.S.-based organizations. The agency has never made the opinion public, so we do not know what legal authority it relied on. However, in September 2003 the Justice Department warned that in light of several seminal Supreme Court cases outlining the unconstitutional conditions doctrine, a similar provision of the Trafficking Victims Protection Act "raises serious First Amendment concerns and may not withstand judicial scrutiny." It seems fair to assume that the February 2004 Leadership Act opinion relied on those same cases.

Then, in September 2004, in an opinion that remains in force, the Office of Legal Counsel reversed course, issuing an opinion stating that "there are reasonable arguments to support the constitutionality" of the Leadership Act's anti-prostitution policy requirement. Like the torture memos, the most charitable characterization of this memo's legal reasoning would be "sloppy." A less charitable soul might call it dishonest. The opinion does not discuss, or even acknowledge, the U.S. Supreme Court's unconstitutional conditions opinions discussed in the

September 2003 memo. Nor does it discuss the obvious compelled speech and viewpoint discrimination problems with the policy requirement.

As things stand, we do not know the reason for the flip flop. But the fact that the relevant law did not change in the interim, together with the poor quality of the opinion's legal reasoning, provides a hint that the decision was based on political calculations.

If that is true, it is deeply disturbing. In our tripartite system of government, each branch has an obligation to interpret and obey the Constitution. The president, in particular, is constitutionally required to "take Care that the Laws be faithfully executed." The Office of Legal Counsel plays an important role in this structure by providing advice to the executive branch about how to conform its activities to governing laws and to the Constitution.

If the agency abdicates its responsibility in favor of political imperatives, it leaves the executive free to act outside of the laws. We know the agency abdicated this responsibility in the war on terror. But which of the executive's many other roles has the Office of Legal Counsel authorized to operate outside of existing legal constraints? It is essential to the proper functioning of our democracy that we find out how deep the agency's dysfunction went, whether the executive branch has taken unlawful actions as a result, and whether the agency continues to enable executive lawbreaking. Only then can we begin to restore integrity to our system of government.

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