

THE OTHER 2002 JAY BYBEE OPINION

The WaPo reports that the Obama Administration might be impeded from filing a suit against the AZ anti-immigrant law because of a 2002 Jay Bybee Memo holding that local police have the authority to detain people for both civil and criminal violations of Federal immigration law. It pitches the story as the Obama Administration being constrained by a Bush Administration reversal of a Clinton Administration position.

In the legal battle over Arizona's new immigration law, an ironic subtext has emerged: whether a Bush-era legal opinion complicates a potential Obama administration lawsuit against Arizona.

[snip]

The 2002 opinion, known as the "inherent authority" memo, reversed a 1996 Office of Legal Counsel opinion from the Clinton administration. "This Office's 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken," says the 2002 memo, which was released publicly in redacted form in 2005 after civil rights groups sued to obtain it.

Though that doesn't account for the fact that the 2002 opinion not only explicitly reverses that 1996 memo, but also dismissed doubts raised in 1989 in an OLC memo authored by Douglas Kmiec.

Indeed, the only contrary suggestion [as to whether local police can enforce federal statutes] of which we are aware is contained in a footnote in a 1989 opinion of this Office. In that footnote, after stating that "it is not clear under current law that local

police may enforce non-criminal federal statutes” and that any exercise of authority granted under state law “would necessarily have to be consistent with federal authority” we opined that “unlike the authorization for state and local involvement in federal criminal law enforcement, we know of no similar authorization in the in the non-criminal context.” Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File at 4 & n.11 (Apr. 11. 1989) (“1989 OLC Opinion”) (emphasis added).

Why does Poppy Bush hate W?

In any case, the WaPo’s discussion does ignore Eric Holder’s suggestion in an exchange with Judy Chu last week (from around 2:54:40 to 2:56:25) that DOJ is considering the 2002 OLC opinion in its larger review of the Arizona law.

REP. CHU: Well, in 1996, the Office of Legal Counsel concluded that the state and local police lacked legal authority to detain individuals solely on the suspicion of being in the country illegally; however, in 2002, Assistant Attorney General Jay Bybee, issued an Office of Legal Counsel memorandum concluding that federal law did not preempt state police from arresting aliens on the basis of civil deportability.

Have you officially asked the Office of Legal Counsel to review this policy?

MR. HOLDER: Not as yet, but the part – as we go through our review, one of the things that has to be taken into account is the 2002 opinion that you referenced,

its continued viability, whether it is a correct assessment of the law, that is all a part of what our review team will be – is in fact, looking at.

REP. CHU: Well, why would you keep that 2002 opinion enforced while it is under review, if it is under review? Especially given the widespread opposition and civil liberties complaints.

MR. HOLDER: Well, I don't think, as I said, it's going to take us a – an extended period of time to decide what action we are going to take. But before we decide to take any action, I think we need to understand this statute in its totality, the impact that it will have, understand and take into account what policies the federal government has put in place including OLC opinions, the history that is involved in all of this. There is a wide variety of things that go into the determination that ultimately we will have to make. And I want to make sure that we take as comprehensive a look as we can before we make what I think is going to be a very consequential decision. [my emphasis]

Aside from all that, I'm rather interested in the redacted portions of the 2002 memo. OLC fought pretty hard to hide what appear to be the underlying reasons to push this expansive local authority for police to arrest suspected undocumented immigrants. Why?