

Transcript

Cheney's Law

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ANNOUNCER: Tonight on FRONTLINE, the battle over the power of the presidency and a new way of looking at the Constitution.

BARTON GELLMAN, *The Washington Post*: They believed that the president could do as he liked, even if Congress, even if the Supreme Court said he couldn't.

ANNOUNCER: For three decades, Vice President Dick Cheney led a secretive and bitter behind-closed-doors battle to restore presidential power.

MARTIN LEDERMAN, *Office of Legal Counsel, 1994-'02*: He believes that the president should have the final word, indeed the only word, on all matters within the executive branch.

ANNOUNCER: After 9/11, there were enhanced presidential powers to detain, render, interrogate, wiretap.

Sen. PATRICK LEAHY (D), *Vermont*: Mr. President, it is time to have some checks and balances in this country!

JANE MAYER, *The New Yorker*: It's a direct showdown constitutionally between the president and Congress.

ANNOUNCER: The latest clash is over secret Justice Department findings authorizing the CIA to engage in the harshest interrogation techniques ever.

Sen. PATRICK LEAHY: Mr. President, we are a democracy!

ANNOUNCER: FRONTLINE goes inside the efforts to rewrite the rules to enhance the power of the presidency. Tonight, Cheney's Law.

JANE MAYER, *The New Yorker*: In Washington, there are so many people who will say, "He's not the same man as I used to know."

DAVID GERGEN, Former Presidential Adviser: There's a lot of speculation among his friends, "Did he change? Did I change? What happened here? Why do we see the world so differently when we once saw it so similarly?"

EVAN THOMAS, *Newsweek*: Cheney is regarded as a pretty reasonable, evenhanded, yes, conservative, but somebody you can work with. What people miss is that he's an absolute fanatic about executive power.

Vice Pres. RICHARD CHENEY: I, Richard Bruce Cheney, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, so help me God.

Chief Justice WILLIAM REHNQUIST: Congratulations.

BARTON GELLMAN, *The Washington Post*: Right around inauguration day, Dan Quayle went to see Dick Cheney, and he said, "You know, Dick, you're going to be doing a lot of traveling, going to a lot of funerals, a lot of fundraisers. You're going to be doing the things that presidents don't want to do and that your president doesn't want to do." And Cheney just looked at him with that little half grin and raised his eyebrow and said, "I have a different understanding with the president."

NARRATOR: The understanding was that the vice president would be the central player in the new administration and do everything he could to enhance presidential power.

DAVID GERGEN: They came in, spurred by Dick Cheney, to have an enlarged sense of the presidency, to have a penchant for secrecy, to basically have a view that the Congress, in effect, works for us, not with us, that we're the lead branch, not a coequal branch.

NARRATOR: And from the beginning, the vice president set the style- secrecy.

CHARLIE SAVAGE, *The Boston Globe*: Vice President Cheney is an extremely secretive public official. He himself doesn't write things down, doesn't use email, because he doesn't want to even raise the possibility his actions could someday be exposed, which would then constrain what he wants to do now.

NEWSCASTER: Executive privilege was also an issue in the vice president's energy task force-

NARRATOR: Through the years, Cheney's penchant for secrecy would cloak bold assertions of executive power and broad claims of executive privilege and an ongoing war with Congress.

NEWSCASTER: -tries to get testimony from White House adviser Karl Rove-

NARRATOR: Cheney had learned some hard lessons early in his political career.

NEWSCASTER: They are now boarding the helicopter, walking through the honor guard-

NARRATOR: He has been watching presidents for three decades.

NEWSCASTER: The president now at the door, a final wave-

NARRATOR: It began at the end of the Nixon administration.

NARRATOR: Thirty-three-year-old Dick Cheney saw it firsthand.

RON SUSKIND, Author, The One Percent Doctrine: He viewed the searing moments of the Nixon administration, which he was there in the front seats for, as a diminution of what the president ought to be.

NARRATOR: Then in 1975, he became President Ford's chief of staff.

DAVID GERGEN: Dick Cheney was in about his mid-30s, for the first time in his life really having a substantial amount of power and responsibility.

Sen. SAM ERVIN (D-NC), WATERGATE COMMITTEE CHAIRMAN: The subcommittee will come to order-

NARRATOR: Cheney watched Congress assert its authority over the president.

JAMES MANN, Author, Rise of the Vulcans: You have a wave of congressional investigations-

Sen. FRANK CHURCH (D), Idaho: The program certainly appears to violate the 4th Amendment to the Constitution.

JAMES MANN: -and Cheney is trying to fight off these investigations.

Prof. JACK GOLDSMITH, Univ. Chicago Law School, 1997-'02: He's talked about how Congress unduly burdened the president and in a way that he believed was unconstitutional.

DAVID GERGEN: And Dick came out of that absolutely committed to the idea of restoring the powers of the presidency.

NARRATOR: Then in the 1980s, Cheney went to Congress.

Rep. RICHARD CHENEY (R), Wyoming: We have a bit of a tendency in the Congress to act as if we're the font of all political virtue in this society, and obviously, we're not.

NARRATOR: He found himself surrounded by Democrats determined to limit Ronald Reagan's powers.

Rep. RICHARD CHENEY: I admit to a certain amount of ambivalence to all of these proceedings and-

NARRATOR: Cheney said Reagan didn't need Congress's approval to fund the Contras through a back door.

Rep. RICHARD CHENEY: I think it was perfectly acceptable for the president to encourage the cause of the Contras.

NARRATOR: At that time, Cheney met David Addington, one of the few staff lawyers who shared his views on executive power.

BRADFORD BERENSON, White House Lawyer, 2001-'03: David Addington is an extremely intelligent, extremely forceful individual.

JACK GOLDSMITH: He first entered the government in, I believe, in the late '70s, when he worked as a lawyer in the CIA.

BRADFORD BERENSON: He has very firmly held views, and very well grounded views, on a lot of issues.

JANE MAYER: You know, Cheney's not a lawyer. So what he finds in Addington is someone who can argue it in a way that can hold sway in the room. I mean, he's got a lawyer now who can say it's constitutional. And so it becomes a very powerful duo at that point. And they've stayed together ever since.

NARRATOR: Together, Cheney and Addington brought their ideas to the Defense Department in the first Bush administration.

Pres. GEORGE H.W. BUSH: This will not stand, this aggression against Kuwait.

NARRATOR: As secretary of defense, Cheney argued the president should not seek congressional authorization for the Gulf war.

Rep. MICKEY EDWARDS (R-OK), 1977-'92: The leadership in Congress generally was telling the first President Bush, "You have to get permission from Congress to go into the Gulf war." The president didn't think that was the case. He resisted it.

RICHARD CHENEY, Fmr. Defense Secretary: [*FRONTLINE 1996*] I argued that we did not need congressional authorization, and that legally and from a constitutional standpoint, we had all the authority we needed.

JACK GOLDSMITH: Secretary of Defense Cheney's advice was that it was unnecessary and imprudent- unnecessary because the Constitution did not require it, imprudent because Congress might say no.

RICHARD CHENEY: [*FRONTLINE 1996*] If we'd lost the vote in the Congress, I would certainly have recommended to the president that we go forward anyway.

NARRATOR: In the end, Cheney's view did not prevail. The president agreed to a congressional vote.

SENATE PRESIDENT PRO TEM: On this vote, the yeas are 52 and the nays are 47.

NARRATOR: As the first Bush administration ended, Cheney and Addington headed to the private sector. They waited for a future president, one more receptive to their ideas.

BARTON GELLMAN, The Washington Post: David Addington, Dick Cheney are true believers in what they are saying. They not only believe that the president has these powers, that the president has effectively unlimited powers as commander-in-chief, but that he has to, and if he doesn't, that this country will be at grave risk.

Gov. GEORGE W. BUSH (R-TX), Presidential Candidate: I believe you're looking at the next vice president of the United States.

NARRATOR: Eight years later, Dick Cheney found a willing partner.

DAVID GERGEN: I think it's something the president's bought into. Did Cheney help to persuade him? Absolutely. But is the president now persuaded? Absolutely. And I think he's now a devotee of expanded executive power.

NARRATOR: The new president brought some of his own people to the task. One of them was his top lawyer, Alberto Gonzales.

BARTON GELLMAN: Bush calls him "Fredo." He's intensely loyal. He was a justice on the Texas court and he'd actually ruled favorably on several important cases for Bush.

DAVID GERGEN, Former Presidential Adviser: They all like him. He's the judge. You know, they call him "the judge" inside the White House. He's a nice fellow. But he's not exactly a heavyweight.

NARRATOR: Gonzales had virtually no experience in matters of constitutional law, executive power or national security. But David Addington did, and he was the vice president's lawyer.

JACK GOLDSMITH: David Addington was someone who had experience in all of the matters that Gonzales initially did not have experience in.

EVAN THOMAS, *Newsweek*: I think it's fair to say that Cheney's lawyer, Addington, dominated Bush's lawyer, Alberto Gonzales.

JANE MAYER, *The New Yorker*: In other presidencies that I've covered, anyway, most of the center of the action is in the president's office. It's in the Oval Office, or maybe even the White House counsel's office. But the strange thing about this administration is all of the most crucial decisions seem to be taking place in the vice president's office, or even the vice president's counsel's office.

[www.pbs.org: The Bush-Cheney relationship]

NARRATOR: But then something happened they could not have imagined, September 11th.

911 OPERATOR: Police operator. What is the emergency?

FEMALE CALLER: Help! Help!

FIRE DISPATCHER: Fire Department. Where's the fire?

911 OPERATOR: This is another call in regards to the World Trade Center.

MALE CALLER: Oh, my God!

NEWSCASTER: It looks like a second plane has hit.

NEWSCASTER: That just exploded!

RON SUSKIND, Author, *The One Percent Doctrine*: I think 9/11 is a moment of preparation meeting opportunity.

FEMALE CALLER: I'm going to die, aren't I!

911 OPERATOR: Ma'am, ma'am, ma'am, say your prayers.

RON SUSKIND: After 9/11, essentially, you know, it's a whole other world.

NARRATOR: The Secret Service took the vice president to a secure room deep under the White House. Meanwhile, the rest of the staff was hurriedly evacuated. One of them was David Addington.

BARTON GELLMAN: David Addington was evacuated, so we started walking home, about to cross into Virginia. When his cell phone finally starts working again, he gets a call from the White House and the message is, "Turn around, come back, the vice president needs you."

SECRET SERVICE GUARD: This is not the place to be unless you have to be here.

NARRATOR: Addington walked back to the White House, and the Secret Service took him down to the bunker.

RON SUSKIND: What Cheney does at that moment is say that we will probably have to be a country ruled by men rather than laws in this period.

BARTON GELLMAN: So on the very morning of 9/11, Dick Cheney is turning to his lawyer and saying, "What extraordinary powers is the president going to need to meet this threat?"

NARRATOR: They wanted to gather as much power for the president as possible. They would need the legal backing of the Justice Department. The first calls were critical.

JOHN YOO, Office of Legal Counsel, 2001-'03: The meetings and conferences were initially done by videophone, that each of the, you know, national security agencies have the capability to link to each other and these locations by high-speed communication networks.

NARRATOR: John Yoo, a 34-year-old lawyer, was on emergency duty at Justice. He had earned his conservative credentials as a clerk for Supreme Court Justice Clarence Thomas and at the Federalist Society.

JOHN YOO: Even before I had gotten to the Justice Department, I had read every previous authorization ever written by Congress in wartime and every declaration of war. That's certainly my field.

NARRATOR: The White House needed John Yoo to authorize emergency presidential powers.

JOHN YOO: I did have the feeling that we were going to start- were entering unchartered territory.

JAMES RISEN, *The New York Times*: John Yoo very quickly begins to be the go-to guy at Justice who is willing to say yes to everything that the vice president and Addington are asking him to do.

JACK GOLDSMITH: He had views about legal issues that they found congenial. And he was very, very knowledgeable and he was very fast. So I think he was a very important player.

NARRATOR: John Yoo worked in one of Justice's most powerful departments, the Office of Legal Counsel, the OLC.

EVAN THOMAS: OLC, the Office of Legal Counsel, is the most important government office you've never heard of.

SCOTT SHANE, *The New York Times*: People who've headed that office in the past have gone on to be on the Supreme Court- Justice Rehnquist, Justice Scalia.

EVAN THOMAS: It is a tiny little sort of mini-Supreme Court that passes legal judgment on whatever the administration wants to do.

NARRATOR: At the OLC, John Yoo, with the input of Addington and the White House counsel's office, drafted his first piece of legislation.

JOHN YOO: It's an extremely broad statute, and it says use all necessary means to stop future terrorist attacks and to, you know, find those responsible for the past attacks.

NARRATOR: On Friday, September 14, with John Yoo's proposed legislation in hand, the administration reluctantly made a political gesture: They asked Congress to approve the measure.

JANE MAYER: The White House tries at some point to see if they can get Congress to go along with giving them complete power to wage the war on terror globally against anybody that they deem to be a terrorist.

RON SUSKIND: And the key area that they want is that the president can use wartime authority, very, very broadly constructed, in the United States.

NARRATOR: But the Democrats weren't disposed to grant such sweeping presidential authority, and they controlled the Senate.

BRUCE FEIN, Assoc. Dpty. Atty. General, 1981-'83: Congress had experience going back to the Gulf of Tonkin Resolution, a series of yielding power that made them a little bit chastened about how far they wanted to go.

MICHAEL ISIKOFF, *Newsweek*: They saw it as completely unchecked authority for the president to take any military action anywhere in the world.

JANE MAYER: And Congress rejects this and says, "No, we're not going to go quite that far."

NARRATOR: It was exactly what Cheney and Addington feared, Congress limiting the president.

RON SUSKIND: And so Cheney and Addington and others sit down after that and say, "Well, we shouldn't have to go to them. We're in a state of emergency. We need to do what's needed."

MICHAEL ISIKOFF: The White House then secretly asked the Justice Department for another legal memo.

NARRATOR: That day, at the Justice Department, John Yoo went to work.

JOHN YOO: The Justice Department had long thought that Congress cannot limit the commander-in-chief power, that Congress cannot tell the president how to exercise his judgment as commander-in-chief.

NARRATOR: The secret memo was officially signed by John Yoo 11 days later.

"The president has broad constitutional power to use military force."

JOHN YOO: The laws as they were written and the Constitution that we have gives the president a lot of power in wartime. The president is the commander-in-chief.

"These decisions, under our Constitution, are for the president alone to make."

JACK GOLDSMITH: The truly remarkable thing about the opinion is it went beyond the idea that the president didn't need Congress's authorization and said that there was nothing the Congress could do to stop the president from doing these things. That was the remarkable part of the opinion.

JANE MAYER: So what Congress took away, the Justice Department gave.

NARRATOR: The president was told he now had the authority to use virtually any means necessary anywhere, against any enemy, as long as the nation was at war.

[www.pbs.org: Bush's wartime powers]

BRADFORD BERENSON, White House Lawyer, 2001-'03: If you were president of the United States, I think you personally would want to make certain that you had done everything you could to prevent another catastrophic act of terrorism.

Pres. GEORGE W. BUSH: This act will not stand. We will find those who did it. We will smoke them out of their holes.

BARTON GELLMAN, The Washington Post: Within days of 9/11, it became clear to insiders that there was going to be war in Afghanistan. And pretty soon, people started

asking themselves, "What are we going to do with all the people we start picking up on the battlefield?"

NARRATOR: The problem fell to Alberto Gonzales, who handed it off to an official at the State Department.

Amb. PIERRE-RICHARD PROSPER, State Department, 2001-'05: A week after September 11th, I was in the White House, meeting with then the White House counsel, Alberto Gonzales, and David Addington.

NARRATOR: Pierre-Richard Prosper was Colin Powell's war crimes ambassador.

PIERRE-RICHARD PROSPER: And because of my background, having been a war crimes prosecutor in Rwanda and having dealt with these issues, it was decided that I would lead an interagency group to look at this question.

NARRATOR: Prosper brought almost two dozen lawyers from around the government to the State Department.

BARTON GELLMAN: They were going to meet on the seventh floor of the State Department, around the corner from Colin Powell's office, and they were going to come up with a recommendation for the president about how to handle these prisoners.

PIERRE-RICHARD PROSPER: I put the problem on the table. How are we going to deal with them? How can we prosecute them? What can we prosecute them for? And ultimately, where will they be detained?

NARRATOR: But in the White House at the same time, David Addington was initiating a secret process.

JANE MAYER, *The New Yorker*: They knew exactly where they wanted to go. They let the State Department group go and do its study and ponder all these great things, but they decided to, on their own in the back rooms, make the decisions on their own.

BARTON GELLMAN: Cheney wants suspected terrorists, enemies of the United States, to be held as far as possible from civilian courts and as far as possible from thick rule books and precedents under the Uniform Code of Military Justice.

NARRATOR: Ambassador Prosper's group handed in their report. But while they waited, Cheney and Addington quietly acted on their own plan. First they got the OLC to sign off on a presidential order, then they would outmaneuver others in the administration.

BARTON GELLMAN: Addington and Yoo discuss how they're going to create a military commission. Almost no one else is consulted. And Addington drafts a four-page text.

NARRATOR: At their weekly lunch on November 13th, in a small dining room just off the Oval Office, the vice president delivered Addington's four-page document to the president.

BARTON GELLMAN: We know from witnesses that Cheney walks in the room with a document. We know he carries it back out with him afterwards. We know that it then changes hands four times around the West Wing of the White House.

NARRATOR: Within an hour, the document was ready for the president's signature.

BRADFORD BERENSON: What I remember is standing in the staff secretary's office in the West Wing with Stuart Bowen, with final copies of the military order for the president to sign, and being aware that he was about to leave the West Wing for some trip. In fact, I think we could hear the helicopter landing on the lawn as we approached the Oval Office.

BARTON GELLMAN: And Bowen says, "That's not the way it works around here. The way it works around here is that every single person with the rank of assistant to the president, every one of them gets to look at this thing first, make their comments, sign off, then it goes to the president." Bowen gets told, "This can't wait. This is urgent. This is secret. The president's waiting for it. He already knows it's coming."

BRADFORD BERENSON: The people involved in this did not want to wait for the president to get back from whatever one or two-day trip he was going on. They felt it was important that the authority to create these commissions exist immediately. And so Stuart and I went into the Oval Office, brought the order to the president. He quickly reviewed it and put his signature on it, and then headed off down the hallway with Andy Card and a couple of others to get on the helicopter.

NEWSCASTER: President Bush has signed an order approving the use of a special military tribunal-

NEWSCASTER: And it was only the latest of a series of dramatic changes-

NEWSCASTER: The White House is defending President Bush's-

EVAN THOMAS, *Newsweek*: It's really to end-run this process. They don't even tell the lawyer from the National Security staff, John Bellinger. He finds out about it after the president has signed the document. And Bellinger comes bursting into Gonzales's office, saying, "What is this? I mean, you didn't even tell me about an essential document of that's really going to govern national security strategy after 9/11."

NEWSCASTER: President Bush signed an order to allow special military tribunals-

BARTON GELLMAN: The news breaks on cable television. Colin Powell happens to be watching. He's astonished by what he's just seen, He picks up the phone to Prosper and he says, "What the hell just happened?"

PIERRE-RICHARD PROSPER: We did have a conversation, and I let him know I was in the dark.

NARRATOR: Secretary of State Colin Powell, National Security Adviser Condoleezza Rice and their lawyers had been kept out of the loop.

Pres. GEORGE W. BUSH: We are not going to call them prisoners of war. These are killers. These are terrorists.

JACK GOLDSMITH, Defense Dept. Lawyer, 2002-'03: At that point, it seemed like the administration had decided that speed was more important than these other values. And early on, the imperatives to get things done trumped the normal processes of deliberation and consultation.

NARRATOR: In the fall of 2002, conservative law professor Jack Goldsmith left the University of Chicago and joined the Defense Department.

JACK GOLDSMITH: I thought it would be an extraordinary opportunity to be in the middle of it.

Vice Pres. RICHARD CHENEY: They are not lawful combatants. These are the worst of a very bad lot. They are devoted to killing millions of Americans-

NARRATOR: Within days, the education of Jack Goldsmith began.

Vice Pres. RICHARD CHENEY: -and they're perfectly prepared to die in the effort.

JACK GOLDSMITH: Late one night, I got a call telling me that a seat had opened up on a plane going to Guantanamo. And of course, I jumped at the opportunity. And it happened to be my 40th birthday.

NARRATOR: The plane flew directly to the Guantanamo Naval Air Station. It was filled with lawyers, including David Addington. They had helped write the administration's rules governing detainees and now they wanted to see them in action.

JACK GOLDSMITH: We walked through one of the compounds that held the detainees. And they were kept in very close quarters, 20 men in these cage-like rooms, sort of staring at you and looking at you as if you were alien or something worse. I just had no sense of what they were or what they had done.

NARRATOR: That summer, the lawyers- Addington, Yoo and others- had okayed tough new interrogation policies.

BARTON GELLMAN, *The Washington Post*: A delegation from the CIA and the military and a few other agencies bring in John Yoo to the White House. And Addington is there, Gonzales is there. And the question is, what are going to be the limits, legally, on interrogation in this new kind of war that the president has declared?

JOHN YOO, Office of Legal Counsel, 2001-'03: It's the CIA who was asking because they're the ones who have high-value detainees, you know, people like Abu Zubaida and- you know, who's the number three person in al Qaeda.

NARRATOR: Yoo's new definition of torture was so narrow that it was almost impossible to commit the crime.

JANE MAYER: What that memo did was it defined torture down, so that the only thing that really winds up being torture is inflicting pain on someone of an order that would be equivalent to organ failure. And it has to be the intentional infliction of pain because you could always argue, "Oh, I didn't really mean for it to be so painful."

NARRATOR: The document, known as the Bybee memo, said the president could authorize whatever techniques were necessary to fight the war on terror.

JOHN YOO: Are we going to restrict ourselves to reading them Miranda rights, providing them a lawyer and the right to remain silent, and trying them in federal court, despite the fact that they must have knowledge of the names of al Qaeda operatives who may be in the United States and in western Europe, and who are planning attacks on the United States? I find it- I don't find any reasonable alternative being proposed by critics. And I think it's incumbent in this kind of war that we're still in the middle of, that people who want to pursue a different policy come up with what that policy ought to be.

NARRATOR: The same day they flew to Guantanamo, Jack Goldsmith and the lawyers also flew to see other detainees, American citizens being held solely on the order of the president- in South Carolina, Jose Padilla, in Virginia, Yaser Hamdi. Both were being held in solitary confinement, with no access to lawyers.

JACK GOLDSMITH: I was moved at the time to think that there's something not quite right about this, that even though we had the legal authority to detain people, that maybe this isn't the right way to go about it. The circumstances and conditions of detention should be different.

NARRATOR: Back in Washington, Jack Goldsmith was spending a lot of time with John Yoo.

JACK GOLDSMITH: I saw John a lot when I worked in the Department of Defense. We were close friends. We did things together. We went to dinner. We played squash.

NARRATOR: Goldsmith and Yoo were rising stars in conservative legal circles, even co-authoring a magazine article. But in the spring of 2003, John Yoo's Justice

Department career was about to end. It happened when the head of OLC resigned and John Yoo didn't get the job.

JACK GOLDSMITH: We had lunch the very day that he got the news that he wasn't going to be the head of the Office of Legal Counsel.

NARRATOR: The idea of promoting Yoo had been strongly supported by David Addington and Alberto Gonzales, but Attorney General John Ashcroft wouldn't hear of it.

EVAN THOMAS: Ashcroft could see that his own guy was really not his guy, after all. He was the vice president's guy. And it irritated Ashcroft that Yoo was, in effect, going behind his back.

SCOTT SHANE, *The New York Times*: John Ashcroft referred to John Yoo as "Dr. Yes" for what he saw as excessive accommodation of White House demands.

NARRATOR: Cheney, Addington and Gonzales needed someone they could trust at OLC. Yoo recommended Jack Goldsmith. They liked the idea. Goldsmith promised Ashcroft he'd keep him in the loop, and by October, Jack Goldsmith was sworn in as the new head of OLC.

JACK GOLDSMITH: I was extraordinarily naive. I had a sense this was an important job. I had a sense that it was heavily involved with the war on terrorism. I did not have a full sense of the nature of the issues or the pace.

NEWSCASTER: -car bombs exploded in Baghdad-

NEWSCASTER: Another deadly car bomb-

NARRATOR: As the insurgency began to engulf Iraq, the vice president and David Addington wanted to get tough with the terrorists. In order to do so, they had to make the case that the Geneva convention did not apply.

JANE MAYER, *The New Yorker*: There was a tremendous fight going on about whether or not in Iraq, the Geneva conventions should apply to all detainees.

NARRATOR: While they waited for a decision from Washington, some commanders in Iraq were pushing the limits of coercive interrogation. The White House legal team, who were used to quick and supportive decisions from the OLC, wanted Goldsmith's approval in a hurry. It was Goldsmith's first week on the job.

"Article 4, persons protected by the convention are those who at a given moment and in any manner"-

JACK GOLDSMITH: It wasn't a terribly easy issue, but after my own research, I concluded that for Iraqi citizens in Iraq, even if they were terrorists, that they received Geneva convention protections.

NARRATOR: Goldsmith decided to deliver the bad news in person. He drove the six blocks to the White House with Deputy Attorney General Patrick Philbin.

JACK GOLDSMITH: And on the way over there, he said to me, "They're going to be mad. They've never been told no before." And he was right. I announced the conclusion. Gonzales asked me three or four questions. I walked him through the legal analysis. He didn't ask me any questions after that. I received my first broadside from David Addington.

RON SUSKIND, Author, The One Percent Doctrine: And Addington has thought it through. He's ready for the fight. And it is a fight.

NARRATOR: Addington angrily argued an earlier presidential decision denying al Qaeda Geneva protections should apply in Iraq.

JACK GOLDSMITH: I was a little bit unprepared for the vehemence of the reaction.

RON SUSKIND: He essentially says, "Are you with us or are you against us?"

BRADFORD BERENSON, White House Lawyer, 2001-'03: They're both very, very smart and very, very stubborn, but neither one of them would ever climb down from a firmly held view.

NARRATOR: And Addington was well known for his temper.

JANE MAYER: He's very gruff and incredibly forceful behind doors in meetings.

EVAN THOMAS: He can go from mild to hot pretty quickly. And he's sarcastic, and he makes effective use of sarcasm and his own great intelligence and his ability to put people down to wield a pretty sharp knife in small meetings.

JACK GOLDSMITH: And he acted with the implicit blessing of the vice president. So all of these things made him a very, very forceful presence. But most of Addington's power vis-a-vis me was basically in the bluster and the yelling and the bringing arguments to my attention.

NARRATOR: Addington and Cheney were forced to comply with Jack Goldsmith's decision. The Geneva convention would now apply to all Iraqis. Back at the Justice Department, it was time for Jack Goldsmith to be shown the most closely held secrets.

EVAN THOMAS: He's handed this stack of letters that John Yoo has written authorizing or permitting all sorts of government activities.

JACK GOLDSMITH, Asst. Atty. Gen., OLC, 2003-'04: My reaction on being briefed into these programs was at first to be struck by how much more was going on, and how much more intense and serious and controversial the war on terrorism was than I realized, based on my previous experiences.

[www.pbs.org: Read Goldsmith's extended interview]

NARRATOR: Goldsmith was one of the first outsiders to read the memos written by his friend, John Yoo. To his surprise, they placed almost no limits on the power of the president.

JACK GOLDSMITH: I knew that there were big problems. I thought that there were errors in some of the legal arguments, sometimes bad errors. I thought that there were extravagant and unnecessary claims of presidential power.

JANE MAYER: He took a look at a few things that had been authorized and basically said, "Oh, my God, I cannot believe they're doing this," and said, "You've got to stop right away."

NARRATOR: One of the programs was authorized by John Yoo right after 9/11. It was the centerpiece of intelligence gathering in the war on terror.

JACK GOLDSMITH: It was a very closely held secret. It was- you know, very very, very few people in the Department of Justice were- knew about this.

NARRATOR: They called it the "crown jewel."

JAMES RISEN, *The New York Times*: They began to spy on Americans in an unprecedented way, in a way that they never had done before, by creating a special program to eavesdrop on Americans without warrants on their international phone calls and also by mounting a massive data mining operation.

NARRATOR: The data from billions of telephone calls and emails were being captured by the National Security Agency. But in the 1970s, Congress had prohibited such activities without the approval of a special court.

BARTON GELLMAN: The initial justification, legally, comes from yet another memo by John Yoo, in which he says that Congress may no more regulate the president's gathering of intelligence against enemies than it can decide where he deploys troops on the battlefield.

JOHN YOO: If it's part of the president's power as a constitutional matter to gather intelligence, including intercepting communications, then that's a power that's included and Congress can't seize it just because it wants to.

NARRATOR: The program was top secret when Jack Goldsmith decided to review it.

JACK GOLDSMITH: It's the most important thing during my time in government, and it is central to the government's counterterrorism policy. So the stakes were enormous.

NARRATOR: Once again, Goldsmith couldn't support the administration.

JACK GOLDSMITH: I went as far as I could. But at some point, the legal arguments just ran out.

NARRATOR: Goldsmith took his concerns to James Comey, a former U.S. attorney who was second in command at Justice.

EVAN THOMAS: Goldsmith and Comey were kindred spirits. They understood that their job was to uphold the law.

JAMES RISEN: Goldsmith, you know, delivers this legal opinion. Comey decides that he has a real problem with this NSA program and he tells Ashcroft, and Ashcroft agrees with him.

NARRATOR: Attorney General John Ashcroft was supposed to sign a reauthorization of the program every 45 days, and for two years he had. But now he balked.

JAMES RISEN: And they're waiting for the deadline for the reauthorization, and then Ashcroft gets sick.

EVAN THOMAS, *Newsweek*: He's so sick, so ill, that he has to lie down on the floor. He's on the verge of passing out. He has to be hospitalized.

NARRATOR: It was acute pancreatitis, severe enough that James Comey became the acting attorney general. He will decide whether to reauthorize the surveillance program.

JAMES RISEN: And he decides he can't reauthorize it the way it exists.

NARRATOR: But Addington, Cheney and the president fought back. Alberto Gonzales and chief of staff Andy Card went to Ashcroft's hospital room.

DAN EGGEN, *The Washington Post*: [?] Deputy chief of Staff Jim Comey gets word that Alberto Gonzales and Andrew Card are on the way to see Ashcroft.

JAMES RISEN: And Comey gets his car and his security detail and they rush to the hospital to try and beat them there.

JACK GOLDSMITH, Asst. Atty. Gen., OLC, 2003-'04: It was the evening, about 8:00 o'clock, and I got a call from the Justice Department command center. So I rushed to the hospital, double parked, ran up the stairs.

EVAN THOMAS: Ashcroft's own wife doesn't want the White House men to come barging in there.

JACK GOLDSMITH: He had tubes going in and out of him. He looked ashen, and I actually thought he looked near death. I thought he looked just terrible. I walked Alberto Gonzales, the White House counsel, and Andrew Card, the president's chief of staff.

RON SUSKIND: They would have to know that a healthy John Ashcroft would oppose them. They would know that.

JACK GOLDSMITH: Judge Gonzales had an envelope in his hand, and it became apparent that he was there to ask the attorney general to authorize this program. Attorney General Ashcroft kind of lifted himself. He arose from the bed, you know, lifted himself up and gave about a two or three-minute speech or talk addressed to Gonzales and Card, in which he basically- I can't get into the details, but he showed enormous, unbelievable clarity about what the issues were and what was going on. And he explained why he also would not approve the program.

And he read them a bit of the riot act, and then he said- at the end of all this, he said, "In any event, I'm not the attorney general now. Jim Comey is," because Jim Comey was the acting attorney general. And with that extraordinary performance- and it was just amazing, one of the most amazing things I've ever seen in my life, because he went from seeming, you know, near death to having this moment, this amazing moment of clarity.

And he just again receded into the bed, and I really worried at that point that he was going to expire. And I mean, it just- it looked like he gave it the last of his energy. It was an intense, unbelievable scene. And Gonzales and Card quickly left, and that was the end of it.

NARRATOR: The next morning, at the urging of his inner circle, President Bush reauthorized the program on his own signature. At the Justice Department, Jack Goldsmith prepared his letter of resignation.

JACK GOLDSMITH: I had drafted my resignation letter and was prepared to resign, and I was sure I was going to resign that day. It was inconceivable to me, based on what had happened the last two days, that I wouldn't resign.

NARRATOR: As many as 30 other Justice Department employees also threatened to resign, including James Comey, John Ashcroft, and even Robert Mueller, the director of the Federal Bureau of Investigation.

RON SUSKIND, Author, The One Percent Doctrine: Bush views Mueller as a warrior in the war on terror, in the battle, just like Bush and Cheney are. The rest of them he sees as lawyers- you know, guys who watch the battle. So when Mueller says, "This is about rule of law, and Mr. President, I will have to resign if you don't make the right choice here," that finally stops Bush.

NARRATOR: The president agreed to change enough of the program so it was legally acceptable to the Justice Department. The change remains top secret.

Pres. GEORGE W. BUSH: I want to thank my superb campaign team-

NARRATOR: That fall, the president and the vice president won reelection.

Pres. GEORGE W. BUSH: The vice president serves America with wisdom and honor, and I'm proud to serve beside him.

NARRATOR: Attorney General John Ashcroft, Jack Goldsmith and other top Justice Department officials left the administration. Then the president's own lawyer, Alberto Gonzales, was named attorney general.

EVAN THOMAS, *Newsweek*: He'd been on the vice president's side in these battles. They wanted somebody they could control.

SCOTT SHANE, *The New York Times*: It was an effort by the White House to get control again of Justice, to make sure that there's no repeat of that rebellion of 2004.

NARRATOR: As Gonzales prepared for what promised to be bruising confirmation hearings, Justice published on its Web site a kinder, gentler "torture memo."

SCOTT SHANE: It's first words are, "Torture is abhorrent."

"Torture is abhorrent both to American law and values and to international norms."

CHARLIE SAVAGE, *The Boston Globe*: It's a much more modest-sounding memo, although it has a critical footnote that says, "By the way, everything we've been doing up until now we still think is legal."

"While we have identified various disagreements with the August 2002 memorandum"-

CHARLIE SAVAGE: That footnote calls into question whether this really was a change or was just window dressing.

NEWSCASTER: The nation has a new attorney general, Alberto Gonzales.

NARRATOR: Behind the scenes, Gonzales took charge. He began to exert control over the OLC, appointing Steven Bradbury to replace Jack Goldsmith. But the appointment had a catch.

SCOTT SHANE: Some people at Justice told us that that was essentially a trial period during which he had to demonstrate to the White House that he wasn't going to make any big trouble.

NARRATOR: Bradbury wrote a top secret opinion to authorize the harshest techniques yet for CIA interrogations.

SCOTT SHANE: These are very harsh techniques which had not been approved in decades of U.S. practice, including slapping people, keeping them in cold rooms, sleep deprivation, bombarding them with music, and even water boarding, the simulated drowning. This opinion, we're told, gives expansive approval to the combination of those different tactics.

NARRATOR: Steven Bradbury passed his trial period. The president nominated him permanent head of the Office of Legal Counsel. By this time, the vice president found himself engaged in a new struggle with Congress, Abu Ghraib.

NEWSCASTER: Demonstrators gathered outside Iraq's Abu Ghraib prison today, protesting the treatment of inmates-

NARRATOR: On Capitol Hill, Congress was beginning to stir. The issue, torture.

Sen. JOHN McCAIN (R), Arizona: *[October 5, 2005]* Abuse of prisoners harms, not helps in the war on terror.

Sen. LINDSEY GRAHAM (R), South Carolina: It is now time for Congress to say no.

NARRATOR: Even conservative Republicans in the senate began to complain.

Sen. LINDSEY GRAHAM: Congress has been AWOL when it comes to the war on terror in terms of interrogation, detention and prosecution, and we've done it in a way to weaken our nation.

NARRATOR: The vice president's fear that Congress would force a showdown and limit the president's power was now a reality.

Sen. JOHN McCAIN: We must never simply fight evil with evil.

NARRATOR: Senator John McCain introduced a tough anti-torture resolution. It was gaining strong support when the vice president began to act.

BARTON GELLMAN, The Washington Post: In ways public and private, and especially private, Cheney starts heading to the Hill, and lobbying McCain especially.

MARTIN LEDERMAN, Office of Legal Counsel, 1994-'02: There was a lot of real hardball going on, and arm twisting, in which they were going to loyal Republicans and saying, "If you prohibit us from doing these things, people will die."

NARRATOR: For those in Congress who believed the executive branch had gone too far, torture was just the kind of issue where they could draw the line.

Sen. JOHN MCCAIN: This isn't about who they are, this is about who we are.

NARRATOR: The president threatened to use his first veto ever, but in a 90-to-9 vote, the Senate rebuked the White House.

NEWSCASTER: President Bush is forced to retreat after-

NEWSCASTER: The White House reversed course-

NEWSCASTER: Vice President Dick Cheney long resisted McCain's amendment-

NARRATOR: It looked like a rare setback for the vice president.

NEWSCASTER: The announcement came after months of administration resistance.

NARRATOR: So the White House arranged a public display of capitulation. The president acknowledged McCain and Congress's victory.

Sen. JOHN McCAIN: I thank you, Mr. President.

Pres. GEORGE W. BUSH: Thank you. I appreciate it. Thank you.

NARRATOR: The president decided to sign the bill from his ranch in Crawford five days after Christmas.

CHARLIE SAVAGE: Congress is out of town. The president's out of town. Most of the press corps is on vacation. No one's really paying attention to what's happening. And around 8:00 P.M. on the day he signs the bill, the White House quietly issues a document which gets filed into the Federal Register.

NARRATOR: The document, known as a signing statement, had been drafted by White House staff.

BARTON GELLMAN: On the day of the signing, the statement is sitting in the staff secretary's office. David Addington takes his copy and he literally draws a red line through the entire text and he substitutes a single, very long sentence.

NARRATOR: Some in Washington were watching closely for just such a move.

MARTIN LEDERMAN: I was actually on my way out to a New Year's Eve party, waiting for it to appear on the White House Web site, and sure enough, it popped up.

"The executive branch shall construe in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch as commander-in-chief"-

CHARLIE SAVAGE: And what that means in plain English was, "My instructions to the executive branch is this provision is unconstitutional because it infringes on my core, exclusive powers as president. And so regardless of the fact that I've signed it into law, it need not be obeyed as written."

NARRATOR: In Washington, they began searching for more signing statements from the administration. The Boston Globe found hundreds of them.

CHARLIE SAVAGE: What it turned out to be was a road map, essentially, to the implications of the unfettered presidency that the Cheney legal team was trying to create.

NEWSCASTER: Lawmakers are saying that signing statement defeats the purpose of the law-

INTERVIEWER: Members of Congress want to know why President Bush just ignored the law-

NEWSCASTER: -raising questions about the reach of executive power.

NARRATOR: The signing statements were primarily the handiwork of one person in the administration, David Addington.

JANE MAYER, *The New Yorker*: Addington is the Picasso of signing statements, the master of the art form, and nobody has created more of them and insisted on putting more of them into legislation. So it's really his thing.

[www.pbs.org: More about David Addington]

JACK GOLDSMITH, Author, *The Terror Presidency*: He was, during my time in office, the person that was pure on defending every single potential presidential prerogative from congressional intrusion through signing statements.

NARRATOR: Within the signing statements are more than 1,000 implicit constitutional challenges to acts of Congress.

JANE MAYER: It's a direct showdown constitutionally between the president and Congress. Congress has the right to pass laws, but the president's saying, "But I'm not going to obey all your laws."

[www.pbs.org: More about the signing statements]

NARRATOR: While the signing statements were one way to challenge Congress, writing legal opinions was another. A new, highly classified opinion from the OLC reportedly limited the effect of the McCain amendment.

SCOTT SHANE, *The New York Times*: It essentially let the CIA off the hook, even under the new standard that Congress was about to impose.

NARRATOR: In effect, it appears the White House had managed to get the OLC to let them do what they wanted.

SCOTT SHANE: The Justice Department, in these secret opinions in 2005, which remain in effect, has carved out essentially the same latitude for the CIA to do the things that it was doing under the John Yoo memo of 2002.

NEWSCASTER: Democrats will have the upper hand in the new Congress-

NEWSCASTER: Democrats took control of the House for the first time in 12 years.

NARRATOR: In the fall of 2006, the midterm elections.

NEWSCASTER: It's a sweep. Democrats have sealed control of both houses of Congress.

NEWSCASTER: Discontent with the president is having a major impact on these elections.

NARRATOR: After the Democrats won, they wanted some of Congress's power back.

RON SUSKIND, Author, *The One Percent Doctrine*: Now Cheney and Addington have something very different to deal with, a Congress with subpoena power.

NARRATOR: Congress began by digging into that "crown jewel" issue, warrantless domestic wiretapping.

JAMES COMEY, Dpty. Atty. General, 2003-'05: *[May 15, 2006]* I was very upset. I was angry. I prepared a letter of resignation, intending to resign-

NARRATOR: James Comey, Jack Goldsmith's boss at the DoJ, was called to testify. Under oath, he revealed that hospital story and the reasons he threatened to resign.

JAMES COMEY: I believed I that couldn't stay if the administration was going to engage in conduct that the Department of Justice has said had no legal basis. I just simply couldn't stay.

NARRATOR: Congress wanted more information, so it issued subpoenas for some of the vice president's documents, including those from the OLC. But the administration would say they didn't have to respond and would raise the prospect of claiming executive privilege.

"The vice president respects the legal privileges afforded by the Constitution to the presidency, such as executive privilege, protecting, among other things, national security secrets and policy deliberations."

NARRATOR: The White House sent Alberto Gonzales to testify before Congress.

MICHAEL ISIKOFF: Alberto Gonzales is left as the guy to sort of defend it in public, but I think people really felt he was defending decisions that were primarily coming from the vice president's office.

[July 24, 2007]

Sen. ARLEN SPECTER (R), Pennsylvania: Mr. Attorney General, do you think constitutional government in the United States can survive if the president has the unilateral authority to reject congressional inquiries on grounds of executive privilege?

ALBERTO GONZALES, U.S. Attorney General: Senator, you're asking me a question that is related to an ongoing controversy which I am recused. I will say the president has tried very hard-

Sen. ARLEN SPECTER: No, no. I'm not asking you a question about something you're recused of, I'm asking you a question about constitutional law.

ALBERTO GONZALES: You're asking me a question-

Sen. ARLEN SPECTER: I'm asking you whether-

ALBERTO GONZALES: -that's related to an ongoing controversy-

Sen. ARLEN SPECTER: -whether you can have a constitutional government with the Congress exercising its constitutional authority for oversight, if when the president claims executive privilege, the president then forecloses the Congress from getting a judicial determination of it. That's the constitutional law-

JACK GOLDSMITH: It's very, very hard for Congress to enforce its subpoenas against an executive branch bent on asserting executive privilege. Congress's real recourse is to use politics to cause harm to the administration to get them to do what Congress wants it to do.

Sen. PATRICK LEAHY: You come here seeking our trust. Frankly, Mr. Attorney General, you've lost mine. I take no pleasure in saying this, but I'm seriously, gravely disappointed. Adjourned.

MICHAEL ISIKOFF: Senior people at the White House realized they had a government to run and they couldn't have an attorney general as crippled and wounded as Alberto Gonzales.

NARRATOR: Gonzales lasted one more month, then he submitted his resignation.

NEWSCASTER: President Bush is looking for a new attorney general this morning-

NEWSCASTER: -the last day on the job for the Attorney General Alberto Gonzales-

NEWSCASTER: The resignation of Alberto Gonzales-

NARRATOR: Recently, the president nominated a new attorney general, scheduled to appear before Congress this week. He'll be asked about those secret interrogation memos revealing the depths of Cheney and Addington's struggle to control the Office of Legal Counsel.

Congress has put a hold on the nomination of Steven Bradbury, the man picked by the president to run the OLC. Bradbury declined to speak with FRONTLINE.

At the White House, David Addington has been promoted, replacing Scooter Libby as Dick Cheney's chief of staff. Addington also declined to speak to FRONTLINE.

And as for the vice president-

RON SUSKIND: Gonzales is out. Rove's out. And Cheney is ready to fight the next battle tomorrow. Cheney truly believes he's in a conversation with history. You know, it's that same principle, "Victory goes not to the swift nor to the strong but to he who endureth until the end." That's a principle that guides this ship of state and these men who are running it.

NARRATOR: FRONTLINE also asked the vice president for an interview. He declined. However, in 2002, he did speak to Fox News.

Vice Pres. RICHARD CHENEY: I've been around town for 34 years. Time after time after time, administrations have traded away the authority of the president to do his job. We're not going to do that in this administration. The president's bound and determined to defend those principles and to pass on this office, his and mine, to future generations in better shape than we found it. And for us to compromise on this basic fundamental principle would, in effect, do that. It would further weaken the presidency, and we don't want to do that.

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ANNOUNCER: This report continues on our Web site, where you can watch the program again, read extended interviews with administration insiders Jack Goldsmith and Brad Berenson and others, examine analysis by journalists and insiders of Dick Cheney and his views on executive power, the dynamics of the Bush-Cheney relationship, the behind-closed-doors battles within the Bush administration and how the current confrontation over presidential powers can be viewed in the context of history, and read the internal memos discussed in this report. Then join the discussion at PBS.org.

[Next week on FRONTLINE "Showdown With Iran"]

Pres. GEORGE W. BUSH: Iran's active pursuit of weapons threatens the security of nations everywhere.

- Eleven hundred feet of American diplomacy is fear.

Pres. GEORGE W. BUSH: It threatens the Middle East.

- Many of the people who argued to take the United States into Iraq are again beating the war drums.

Pres. GEORGE W. BUSH: -threatens a nuclear holocaust.

- It'd be the worst of all worlds for an outgoing administration to start a conflict.

Pres. GEORGE W. BUSH: We will confront this danger before it is too late.