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**The U.S. Department of Justice, National Security and
Constitutionalization of Politics Since 9/11¹**

Keywords: constitutionalization of politics, U.S. Department of Justice, national security

Słowa kluczowe: konstytucjonalizacja polityki, Departament Sprawiedliwości USA, bezpieczeństwo narodowe

Abstract

The aim of the article is to analyze the phenomenon of the constitutionalization of politics, understood as the influence of non-judicial actors on the procedure of constitutional review on the example of the functioning of selected offices of the United States Department of Justice during the presidencies of George W. Bush, Barack Obama, and Donald Trump. By analyzing the activities of attorneys general and Office of Legal Counsel lawyers, the author shows the important role of these entities in deter-

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mining the constitutionality of surveillance policy of presidential administrations in the field of national security.

Streszczenie

Departament Sprawiedliwości USA, bezpieczeństwo narodowe i konstytucjonalizacja polityki od 11 września 2001 r.

Celem artykułu jest analiza zjawiska konstytucjonalizacji polityki, rozumianego jako wpływ pozasądowych organów na procedurę interpretacji konstytucji i modyfikacji jej znaczenia na przykładzie funkcjonowania wybranych urzędów Departamentu Sprawiedliwości Stanów Zjednoczonych Ameryki w okresie prezydentury George'a W. Busha, Baracka Obamy i Donalda Trumpa. Poprzez analizę działalności prokuratorów generalnych oraz prawników z Biura Doradztwa Prawnego autor ukazuje ważną rolę tych podmiotów w kształtowaniu konstytucyjnych ram polityki inwigilacyjnej administracji prezydenckich w zakresie bezpieczeństwa narodowego.

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I. Introduction: Constitutionalization of Politics

One of the biggest challenges of contemporary democratic governance stems from the relation between law and politics, which influences the quality of the rule of law, the principle of limited government, and the scope of individual liberties. In a constitutional democracy, the links between law and politics are constrained by the text and the meaning of fundamental principles and rules set out by the supreme law of the land. Institutions responsible for constitutional interpretation have the ability to not only determine the powers of government and the scope of rights of individuals, but also to define the compliance of state policies with legal norms². The growing role of constitutions caused that the interaction between law and politics serves as a natural element of governmental process in which political actors became interested in having impact on the character and substance of constitutional

² *The Oxford Handbook of Law and Politics*, ed. K.J. Whittington, New York 2008.

review³. Traditional constitutional interpreters, such as constitutional courts and tribunals, are not always providing a 'proper' meaning of the law, therefore certain political institutions became involved in an informal process of constitutional review, determining the scope of constitutional provisions in a way which justified implementation of concrete policies or political decisions. The term constitutionalization of politics, which shall be the subject of analysis, may be used to define the involvement of political or non-judicial actors in the process of constitutional interpretation.

In the United States, constitutionalization of politics seems intertwined in the nature of judicial and political processes and occurs in at least two dimensions of governmental system. On the one hand, there are areas in which executive and legislative branches tend to take over the responsibility for determining the scope of constitutional provisions, either by introducing laws and policies which – according to them – are not subject to judicial review, or by ignoring judicial decisions which declared these laws and policies as unconstitutional⁴. On the other hand, constitutionalization of politics occurs in political activity of judicial actors, including courts responsible for imposing judicial review and determination of constitutionality of laws and policies of executive and legislative branches. Politicization of such processes leads to conclusion, that when judicial institutions act as advocates of partisan interests, they participate in political activity which goes beyond traditional role of protectors of the constitution⁵. Both dimensions of constitutionalization of politics lead to obvious violation of separation of powers and checks and balances and raise concerns about the legitimization of particular laws and policies, as well as the state of rule of law and democracy.

There are several non-judicial institutions in American governmental system, in which the interconnection of law and politics takes place, and which have been active in imposing constitutional interpretation. The purpose of the

³ M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Northampton 2018; J. Szymanek, *Tradycje konstytucyjne. Szkice o roli ustawy zasadniczej w społeczeństwie demokratycznym*, Warsaw 2006.

⁴ R. Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, New York 2007.

⁵ R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, New York 2007; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton 1999.

article is to analyze the impact of one of such institutions, the United States Department of Justice (DOJ), on the process of constitutionalization of politics. As the topic is very broad, the study shall focus on two offices operating within the Department – the Attorney General (AG), and the Office of Legal Counsel (OLC) – and their impact on the laws and policies concerning national security surveillance in the post 9/11 era. National security has been the leading paradigm for presidential administrations since 1940s, and surveillance became an effective tool of pursuing governmental policies operating in so-called ‘times of emergency’, especially after 9/11⁶. Therefore, the analysis shall refer to the role of AG and OLC during three completed presidencies of George W. Bush, Barack Obama, and Donald Trump. Such an analysis may lead to findings concerning not only the influence of institutions providing legal basis to controversial government policies, but also their growing role as constitutional interpreters redefining the scope of certain clauses and provisions relating to the powers of executive and civil rights.

II. Case Study #1: AG as a Proponent of National Security Surveillance

Attorneys General are often the closest legal advisers to the presidents, providing for opinions on strategic issues for the governing administration. History knows examples of AG who were very active in legitimizing controversial policies of the White House, as well as in serving as political advisers to the chief executives⁷. The contemporary role of the AG, apart from administering DOJ, is dominated by his legal support to presidential policies, both by preparing and promoting legislation consistent with presidential policies. Between 2001 and 2020 there were seven AG and seven officers acting as AG. Due to an ongoing state of emergency caused by the 9/11 and the war on terror, most of AG were involved in an active support of presidential policies, often introducing an interpretation of the Constitution which expanded

⁶ P. Laidler, *Security versus Transparency in the U.S. National Security Surveillance State* [in:] *Trust and Transparency in an Age of Surveillance*, eds. L.A. Viola, P. Laidler, London 2021.

⁷ P. Laidler, *Urząd Prokuratora Generalnego USA. Konflikt kompetencji*, Kraków 2004; N.V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office 1789–1990*, Lawrence 1992.

surveillance powers of the executive. The analysis shall focus on the activities undertaken by these heads of DOJ who openly supported national security surveillance policies of the administration.

John Ashcroft served as an AG during the 9/11 terrorist attack, and he was responsible for drafting President Bush's anti-terrorist policy and legislation. He represented the administration in Congress lobbying for expansion of the powers of government in fighting terrorism and providing security to American citizens. Several DOJ recommendations were presented in the most crucial legislation of that time, including the U.S.A. Patriot Act⁸. Ashcroft was a strong proponent of the legislation, claiming the Act was constitutional and defending it against attacks from liberal organizations. In his opinion, the expansion of the law enforcement powers of the government was justified, as the role of the state was to provide effective security measures and eliminate any threat to the country⁹. As a result, DOJ authorities supported Bush's Terrorist Surveillance Program (TSP) which allowed for warrantless domestic surveillance of people who threatened national security. By imposing an interpretation promoting dominating role of the executive under terrorist threat, the Department's lawyers offered constitutional review which led to legitimization of illegal surveillance programs for the next few years. Despite his strong support towards post-9/11 anti-terrorist legislation, Ashcroft decided in 2004 to neglect the possibility to reauthorize these programs forcing the administration to make changes in their approach towards the issue. On the other hand, his successor, Alberto Gonzales, jr., was not only an advocate of the post-9/11 anti-terrorist legislation, but he supported the OLC memorandum justifying the operation of Stellar Wind¹⁰. Despite growing concern over unconstitutionality of national security surveillance legislation, Gonzales openly claimed the necessity to expand the powers of the executive in the process of reauthorization of the Patriot Act raising criticism from representatives of both political parties¹¹.

⁸ D. Cole, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, New York 2006.

⁹ J. Ashcroft, *Never Again: Securing America and Restoring Justice*, New York 2006.

¹⁰ D.J. Solove, *Nothing to Hide. The False Tradeoff between Privacy and Security*, New Haven 2011.

¹¹ C. Jillson, *American Government: Constitutional Democracy Under Pressure*, New York 2021.

Barack Obama's win in 2008 gave hope to proponents of change in the national security surveillance system, but the president modified, and even expanded, some of the surveillance programs initiated by the Bush administration, supporting surveillance powers based on the Patriot Act, approving the continuation of PRISM program, actively using the national security letters (NSL), and signing the extension of the FISA Amendments Act¹². It seems as if the main purpose of Obama's DOJ was to adapt the law to serve the purposes of the politics of surveillance rather than impose transparent policies. AG Eric Holder often used rhetoric criticizing anti-terrorist surveillance measures—especially the warrantless NSA surveillance—but the policy of DOJ under his reign supported the expansion of the powers of the executive, active use of NSL, and argumentation referring to state secrets doctrine in Supreme Court cases concerning national security surveillance¹³. Although Holder did not suggest any partisan constitutional review, his interpretation of presidential executive powers was not far from the one offered by his predecessors.

The next president, Donald Trump, and his legal advisers from the DOJ became strong supporters of national security surveillance and expansion of executive powers. Before winning the presidency, in 2015, during the debate concerning the future of bulk collection of phone metadata, Trump expressed his support for the program¹⁴. However, when he became the subject of a secret FBI investigation concerning possible connections between his campaign and Russian intelligence, he accused the Obama administration of illegal surveillance. Time showed that Trump's negative attitude towards the leaders of intelligence and law enforcement agencies determined his personal decisions as president. His critical attitude towards the FBI, CIA, and NSA caused a decrease in trust among Republican voters towards the national security agencies, although the source of Trump's negative approach was clearly partisan¹⁵.

Analysis of activities undertaken by Trump's DOJ reveals tensions typical for the Office of Attorney General. His first AG, Jeff Sessions, who supported Trump during presidential campaign, seemed to share the attitude towards

¹² M. Graham, *Presidents' Secrets. The Use and Abuse of Hidden Power*, New Haven 2017.

¹³ M.J. Glennon, *National Security and Double Government*, New York 2015.

¹⁴ Council on Foreign Relations, *Donald Trump on National Security*, <https://www.cfr.org>, 2015 (20.08.2023).

¹⁵ M. Nelson, *Trump: The First Two Years*, Charlottesville 2018.

national security surveillance with the president. But when Sessions decided to recuse himself from coordinating the investigation of ‘Russian contacts’ in Trump’s campaign, the President tried to force the AG to withdraw his recusal, threatening to remove him from office, which happened a few weeks later¹⁶. Such a situation reminds of the famous discussion between President Andrew Jackson and his AG Roger Taney, during which the chief executive demanded concrete legal advice from Taney, threatening to remove him from office¹⁷. Political responsibility of the AG before the president has determined the loyalty of that officer and put him in the middle of political game of instrumental treatment of the law, including the constitution.

During the last year of Trump’s tenure William Barr became the head of DOJ, serving for the second time as AG – first one under George H.W. Bush administration between 1991 and 1993. During his first tenure, Barr was responsible for initiating a surveillance program aimed at collecting information concerning U.S. citizens making international phone calls¹⁸. Although the program turned illegal, that activity defined Barr as a proponent of broad surveillance measures imposed by the executive in the name of protecting the safety of citizens. Thirty years later, Trump’s AG imposed new rules tightening the use of government surveillance on political candidates or their staffers¹⁹. Furthermore, Barr has been very active in imposing constitutional interpretation which favored the President against Congress or, in particular, the Democratic Party. As a proponent of unitary executive theory, he read the Constitution as a source of almost unlimited power of the President, supporting withholding documents by Trump despite congressional demand to reveal them. For that action the House of Representatives voted to hold Barr in criminal contempt for Congress²⁰.

Even if not all of the AG turned out to be active supporters of national security legislation, their approach towards the issue often resulted from the

¹⁶ M. Whitaker, *Above the Law: The Inside Story of How the Justice Department Tried to Subvert President Trump*, New York 2020.

¹⁷ C.W. Smith jr., *Roger B. Taney: Jacksonian Jurist*, Chapel Hill 2018.

¹⁸ N.V. Baker, *op.cit.*

¹⁹ D. Barrett, *Barr Tightens Rules on Surveillance of Political Candidates and Advisers*, “The Washington Post”, 18.08.2020.

²⁰ A. Desiderio, *House Holds William Barr, Wilbur Ross in Criminal Contempt*, “Politico”, 17.07.2019.

political circumstances, such as the post-9/11 terrorist threat, Snowden affair, or presidential policy towards national security in times of emergency. Despite using contradictory rhetoric, most of AG actively advised the presidents to expand surveillance powers of the executive and legalize surveillance programs resulting in collection of metadata of foreigners and American citizens. As a result, DOJ legitimized imposition of controversial surveillance measures in the name of national security, using the constitution as a justification of presidential policies. John Ashcroft, Alberto Gonzales, Eric Holder, Jeff Sessions, and William Barr proved the most active in promoting national security surveillance, and thus being involved in the process of constitutionalization of politics broadening executive powers at the expense of the legislative and judicial branches.

III. Case Study #2: OLC as a Legitim�er of National Security Surveillance

During the last 20 years OLC wrote several legal opinions and memoranda for the executive officers, but the problem with their analysis stems from the level of confidentiality of these documents. The official DOJ website publishes only the chosen opinions, whereas many important memoranda which had impact on presidential policies are kept in secret and rarely released to the public. The law clearly states that the AG is responsible to publish “from time to time” such opinions in the Government Publishing Office which are considered “valuable for preservation in volumes”²¹. Thus, the number of OLC opinions published since 2001 is limited and varies depending on the year of publication, from three in 2015 to twenty-three in 2004. The analysis of the content of published opinions indicates that, since 2001, there were fourteen opinions directly related to national security issues, a few of which focused on the problem of national security surveillance, including the constitutionality of both the Patriot Act, and Foreign Intelligence Surveillance Act of 1978²². Due to the limited disclosure of advisory opinions and—especially—opinions concerning national security surveillance, it would be difficult

²¹ 28 U.S.C. § 521.

²² Office of Legal Counsel, *Opinions*, <https://www.justice.gov/olc/opinions>, 2022 (20.08.2023).

to derive broader conclusions from the published fourteen documents, as the substance of secret memoranda and opinions seems more attractive from the perspective of the research. Some of previously classified documents were revealed/leaked to the public, and one of them, an internal memorandum created by OLC and signed by Assistant AG Jack Goldsmith in 2004 is worth analysis in the context of the process of constitutionalization of politics.

Among several post-9/11 measures undertaken by the Bush administration was the Stellar Wind program, information about which leaked to the press in 2005. It was a part of TSP implemented in 2002 as the response of U.S. government on the ineffectiveness of former surveillance measures imposed by federal agencies. Its main purpose was to collect international phone calls and e-mails of targets suspected of organized terrorism, but in addition to data on foreign nationals the program allowed the NSA to intercept and store metadata from telephone and internet providers, including information about the private communications of U.S. citizens. Importantly, the program not only lacked the approval of Congress and the judiciary but was also based on an internal memorandum created by the OLC. The document assumed that presidents – based on unitary executive theory – had almost unlimited power in determining the scope of government surveillance²³. Referring to specific interpretation of Article Two of the Constitution, the memorandum claimed that the president, as commander-in-chief, had the power to initiate any surveillance program, because all executive power belonged to him, especially in times of war and emergency. Apart from legitimizing Stellar Wind and other initiatives of the TSP, the legal opinion indicated that the lack of control by other branches of government was justified by the necessity to keep the program secret²⁴.

Even if the authors of the opinion believed that Stellar Wind received necessary oversight, as it was reauthorized every 45 days by the administration, it was only an internal control, not real oversight²⁵. Some members of the ad-

²³ E.A. Posner, A. Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, New York 2006.

²⁴ G. Lester, *When Should State Secrets Stay Secret? Accountability, Democratic Governance and Intelligence*, New York 2015.

²⁵ J.-H. Kuntze, *The Abolishment of the Right to Privacy? The USA, Mass Surveillance and the Spiral Model*, Baden-Baden 2018.

ministration criticized OLC interpretation, as the deputy AG James Comey, who raised concerns about the legality of Stellar Wind, especially from the perspective of separation of powers doctrine, but others, like AG Alberto Gonzales tried to convince the President to reauthorize the program²⁶. Despite reference by other presidents to unitary executive theory, for the first time there was such an interpretation of presidential surveillance powers conducted without any control from other branches of government. In such a way, OLC lawyers and their superiors in the DOJ became involved in the process of constitutional review expanding executive powers and limiting the powers of the legislative.

Similar conclusions may be derived from the analysis of the impact of a few other internal memoranda created by OLC lawyers during the Bush administration. The so-called “Torture Memos” were written between 2002 and 2005 as a response to the questions posed by the Department of Defense (DOD) and Central Intelligence Agency (CIA) concerning the use of interrogation techniques towards terrorist suspects. As the constitutional basis for such expanded powers of the executive, the memos referred to presidential war powers stemming from Article Two, and ‘times of emergency’, neglecting the possibility of congressional limitations to the interrogation techniques conducted by the executive²⁷. The documents played a crucial role in legitimizing the tortures of several Guantanamo detainees and served as a legal basis of the activities undertaken by CIA in the said period. Despite not referring directly to national security surveillance, they were based on the same concept of constitutional review as the 2004 unitary executive theory memorandum, as they were created by the same lawyers who interpreted the law as an instrument serving political purposes.

Interestingly, some of the memoranda and opinions undertaken by DOJ lawyers during the Bush administration were rescinded by an opinion issued January 15th, 2009, on the “Status of Certain Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001”. The opinion stated that former legal interpretations authorized by OLC lawyers referring to the limitation of congressional authority over captured enemy combatants, or

²⁶ P.M. Shane, *Madison’s Nightmare. How Executive Power Threatens American Democracy*, Chicago 2009.

²⁷ Office of Legal Counsel, *Opinions...*

to broad interpretation of FISA and its applicability to presidential authority “should not be treated as authoritative”²⁸. Such an internal control of constitutional review imposed by DOJ may, on the one hand, serve as an example of self-limitation to the process of interpretation of the supreme law of the land imposed by subjects which power is advisory rather than decision-making, but, on the other, proves the willingness of Department’s establishment to adjust the meaning of certain constitutional clauses to the ideology and policies of the new president.

IV. Conclusions

National security surveillance conducted by presidential administrations since 2001 was mainly legitimized by official legal opinions or secretive memoranda created in the Department of Justice. Attorneys General and OLC lawyers interpreted the Constitution in such a way which led to expansion of the power of executive, and limitation of the oversight and control powers of the legislative. The said period became a continuous ‘time of emergency’ during which three administrations used different rhetoric but continuously supported the growth of federal government surveillance powers, thus potentially violating the rights and freedoms of U.S. citizens. The tensions between law and politics are deeply rooted in contemporary Department of Justice, where loyalty to politics determines the loyalty to the law, and where the scope of executive powers is expanded by informal constitutional review imposed by DOJ legal advisors. National security surveillance serves as evidence of unified approach of Republican and Democratic administrations towards the means of constitutional interpretation legitimizing all policies which are consistent with constitutional purposes of the government.

Constitutionalization of politics may be observed in the operation of DOJ institutions, including AG and OLC lawyers, especially in providing constitutional interpretation of national security surveillance policies. DOJ lawyers have impact on the implementation and justification of national security programs determining the scope of executive powers and the rights and freedoms of individuals. Contemporary DOJ may be considered an important player in

²⁸ *Ibidem.*

the process of legitimizing the powers of government on the one hand, and, limiting the role of subjects responsible for constitutional review, on the other. Such a situation is accepted by both Republican and Democratic politicians who believe that national security paradigm, which determines the character of domestic and foreign policy of the United States, prevails over the necessity to defend traditional checks and balances system.

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