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A Loophole In the Rules

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Publicly at least, President Obama has made a clean break with his predecessor's controversial counterterrorism policies, but in private the new administration is leaving itself some wiggle room. A day before Obama signed executive orders closing Guantánamo Bay and banning torture, the White House's top lawyer privately indicated to Congress that the new president reserved the right to ignore his own (and any other president's) executive orders. In a closed-door appearance before the Senate intelligence committee, White House counsel Gregory Craig was asked whether the president was required by law to follow executive orders. According to people familiar with his remarks, who asked for anonymity when discussing a private meeting, Craig answered that the administration did not believe he was. The implication: in a national-security crisis, Obama could deviate from his own rules. A White House official said that Craig's remarks were being "mischaracterized."

Some Capitol Hill sources and intel officials said Craig's private remarks constituted a big loophole in new guidelines, one that would allow Obama to behave much like President Bush. "I don't think there's a really big change, sub rosa," said one veteran undercover spy. Intel sources cautioned that Craig's declaration does not mean Obama plans to issue secret orders that would contradict his public anti-torture stance. (During his confirmation hearing, Dennis Blair, Obama's new intel czar, said emphatically that there would be no torture "on my watch.") What it probably means in practice, the spy said, is that Obama could, in a dire emergency, issue a secret presidential "finding" instructing the CIA or another agency to overstep boundaries of public policy. But given the obloquy they have endured for following Bush's orders on interrogations and detentions, said another intel insider, CIA officials might resist any attempts by Obama to issue classified operational orders that contradict his official policies. "They don't want to be asked to do something in secret which has been publicly declared taboo," the insider said.

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