

THE HOLDER DELAY, THE OLC DELAY, THE SJC DELAY

I suggested last week that the Republicans have suddenly decided to challenge Eric Holder's nomination in an attempt to postpone the time when AG Holder (if he is approved) would review the OLC opinions supporting warrantless wiretapping and torture.

It turns out that Patrick Leahy is also worried that BushCo are sitting on OLC opinions it has promised to the Senate Judiciary Committee (h/t Secrecy News).

Even in the final days of the Bush administration, the Department of Justice continues to stonewall congressional subpoenas for documents from the Office of Legal Counsel (OLC), according to the chairman of the Senate Judiciary Committee. Sen. Patrick Leahy (D-Vt.) on Friday underscored the Department's continued obstruction and hit the Department on going back on its word to provide the Committee with copies of six documents related to a subpoena issued in October for OLC documents.

In a letter dated **November 14**, Justice Department officials said the Department was "prepared to make available for Committee staff review at the Department" two national security-related OLC opinions subpoenaed on **October 21**. The Department also wrote that it was "prepared to provide the Committee with copies of additional OLC memoranda on November 17, 2008." Upon receipt of the letter, followed by a verbal assurance on November 17 that the documents were being delivered to the Committee, Leahy postponed the return

date of the subpoena, which was scheduled for November 18. To date, the Department has provided the Committee with copies of just two documents, one of which was not listed in the October 21 subpoena and was already widely available in the public domain. The remaining six documents have been made available at the Department only for staff review.

Here's a list of the OLC opinions the Administration has been playing games with:

A. Memorandum for Alberto R. Gonzales, Counsel to the President, Re "Protected Persons" in Occupied Iraq (March 18, 2004).

B. Any final OLC memorandum or written legal advice concerning applicability of the Fourth Geneva Convention in Iraq, including but not limited to Article 49, including any March 19, 2004 memorandum, Re: Applicability of the Fourth Geneva Convention in Iraq, including but not limited to Article 49.

C. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense ("DoD"), from John C. Yoo, Deputy Assistant Attorney General, OLC, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (October, 2001).

D. Memorandum for Daniel Bryant, Assistant Attorney General, Office of Legislative Affairs, from John Yoo, Deputy Assistant Attorney General, OLC, Re: Applicability of 18 U.S.C. §4001 (a) to Military Detention of United States Citizens (June 27, 2002).

E. Memorandum for William J. Haynes II, General Counsel, DaD, from Jay S. Bybee, Assistant Attorney General, OLC, Re: The

President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (March 13, 2002).

F. Any finalized memorandum from the Department of Justice, Re: Liability of interrogators under the Convention Against Torture and the Anti-Torture Act when a prisoner is not in U.S. custody.

G. Memorandum for John Yoo, Deputy Assistant Attorney General, OLC, from James C. Ho, Attorney-Advisor, OLC, Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Feb. 1, 2002), or any other finalized memoranda or opinions provided by the OLC regarding the interpretation of Common Article 3 of the 1949 Geneva Convention relating to the treatment of prisoners of war.

H. Memorandum for Alberto Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, OLC, Re: Legality of the use of military commissions to try terrorists (Nov. 6, 2001).

The administration has provided the last opinion, and one document the Committee didn't ask for. But it won't hand over documents A through G (I'm assuming they just claim there is nothing responsive to F), though it'll let representatives of the committee look at them.

I haven't read the Philbin opinion they turned over, but it's clear why OLC hack John Elwood said, "The conclusions of the memorandum have been affected by subsequent case law, most particularly the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)," as it must form the basis for a lot of the logic that created Gitmo.

We believe that if a particular use of military commissions to try offenses against the laws of war is constitutionally permissible within the United States, it follows a fortiori that such a use is permissible to deal with enemy belligerents overseas, where many constitutional protections would not apply in any event.

[snip]

We believe that, properly understood, the constitutional analysis in *Quirin* demonstrates that any person properly charged with a violation of the laws of war, regardless of citizenship or membership in the armed forces (of this country or another power), may be tried by military commission. The critical point for constitutional analysis is that a person properly charged with an offense against the laws of war has no right to an indictment or trial by jury under Article III the Fifth and Sixth Amendments.

[snip]

We note that the Supreme Court's decision in *Quirin* also demonstrates that, at least if those charged before a military commission are being held within the territorial United States, they would be able to file a petition for habeas corpus to have an Article III court test whether their cases fell within the jurisdiction of a military commission – that is, whether the offenses charged properly "sets forth a violation of the law of war."

[snip]

But cf. *Johnson v. Eisentrager*, 339 U.S. 763, 787-90 (1950) (holding that the writ of habeas corpus is not available to aliens held outside United States territory)

I'm particularly fond of this logic: Congress has the right to declare war, therefore the President must be able to make the decision about war.

Part of the reason it is difficult to articulate any broadly applicable "test" for determining whether a war exists is that the courts have quite properly concluded that that question (and thus the triggering of the laws of war) is one for the political branches. Early in the Nation's history the Supreme Court recognized that Congress has authority to acknowledge a state of war, and that its decision to do so, whether formally and fully or partially and by degrees, is not subject to judicial question.

[snip]

We conclude that, even without any action by Congress to acknowledge a state of war, the President, in his constitutional role as Commander in Chief, and through his broad authority in the realm of foreign affairs, see, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), also has full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war.

[snip]

By making the President Commander in Chief of the armed forces, the Constitution must be understood to grant him the full authorities required for him to effectively defend the Nation in the event of an armed attack.

Necessarily included among those powers must be the ability to determine whether persons responsible for an attack should be subject to punishment under the laws of war.

Someday, long after this Administration is gone, we might want to think about returning the power to declare war to Congress again. But I suppose that would take Congress asserting that right.

I wonder. Is OLC refusing to turn these over to stall until the time when SCOTUS overrides each and every one of them?