

DURBIN AND WHITEHOUSE: WHY DID MUKASEY GIVE OLC A PEEK AT THE YOO/BRADBURY RESULTS?

Dick Durbin and Sheldon Whitehouse want to know why the Office of Professional Responsibility gave OLC a chance to review their report on John Yoo's and Steven Bradbury's torture memos.

Just last week, they got a response from DOJ on the process the OPR review has gone through, revealing that the report already integrated comments from Mukasey and "OLC" (whose acting head was Steven Bradbury), and was giving Bradbury, Yoo, and Jay Bybee an opportunity to comment, as well. It will take "substantial time" before this review process is done, DOJ says.

OPR has completed its investigation of this matter and in late December 2008, provided the draft report to Attorney General Mukasey and invited comment. Attorney General Mukasey shared the report with Deputy Attorney General Filip and OLC. Thereafter, Attorney General Mukasey, Deputy Attorney General Filip and OLC provided comments, and OPR revised the draft report to the extent it deemed appropriate based on those comments.

In addition, during the course of the investigation, counsel for the former Department attorneys asked OPR for an opportunity to review and comment on the report prior to any disclosure of its results to Congress or the public. Attorney General Mukasey and Deputy Attorney General Filip likewise

requested that OPR provide the former Department attorneys with such an opportunity. For these reasons, OPR is now in the process of sharing the revised draft report with them. When the review and comment period is concluded, OPR intends to review the comments submitted and make any modifications it deems appropriate to the findings and conclusions. OPR will then provide a final report to the Attorney General and Deputy Attorney General. After any additional review they deem appropriate, the Department will determine what disclosures should be made. Due to the complexity and classification level of the draft report, the review process described above likely will require substantial time and effort.


Which of course raises a whole slew of questions, some of which Durbin and Whitehouse have now posed to DOJ. Such as whether OLC's review of the document influenced Steven Bradbury's January 15 OLC memo withdrawing certain earlier opinions.

Your letter does not indicate whether Steven Bradbury was recused from reviewing and providing comments on the draft report. Mr. Bradbury, who was then the Principal Deputy Assistant Attorney General of OLC, is reportedly a subject of the OPR investigation. As such, it would appear to be a conflict of interest for Mr. Bradbury to review and comment on the OPR report. We note that on January 15, 2009, Mr. Bradbury issued a "Memorandum for the Files" criticizing OLC opinions issued in 2001-2003. He wrote that the January 15th memorandum and a previous memorandum were not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards

of professional responsibility.” If Mr. Bradbury did review the OPR report, this could have improperly influenced the opinions he expressed on OLC’s behalf in the January 15th memorandum, particularly his decision to emphasize that the authors of discredited OLC opinions on detainee issues had not necessarily violated their professional responsibilities.

As well as a bunch of questions about whether allowing the subjects of an investigation normally get to comment on the outcome of it.

- 1. Was Steven Bradbury involved in reviewing and commenting on the draft OPR report?*
- 2. Is there any precedent for allowing the subject of an OPR investigation to review and provide comments on a draft report on OPR’s findings and conclusions?*
- 3. Have the former Justice Department attorneys who are the subjects of the investigation been given a deadline for responding?*
- 4. Will OPR provide Attorney General Holder and Deputy Attorney General Ogden with the draft report that it provided to Attorney*



*General Mukasey so that
Attorney General Holder
and Deputy Attorney
General Ogden will know
what revisions have
been made to the
report?*

Somehow, I get the feeling Mukasey tried to stall this out for several months.

Of course, Durbin and Whitehouse don't ask the natural follow-up—will Holder let them continue to stall this out?