

# CLEMENT'S DEPARTURE

As some of you pointed out before I got distracted with the aura of actually having Democratic Presidential candidate(s) in my state, Paul Clement is done. He's not going to stick around and lend his purportedly considerable skills defending the Bush Administration before SCOTUS anymore.

Today, the Department of Justice announced that Solicitor General Paul D. Clement will end his current service to the Department on June 2, 2008.

[snip]

Clement's tenure of over seven years in the Office of the Solicitor General is the longest period of continuous service in that office by an individual who served as Solicitor General since Samuel Phillips, who served from 1872-1885.

[snip]

During his time in the Office of the Solicitor General, Clement argued 49 cases before the Supreme Court, prevailing in the vast majority of them. Landmark cases argued by Clement include Tennessee v. Lane, McConnell v. FEC, Rumsfeld v. Padilla, Gonzales v. Raich, and Gonzales v. Carhart. He also argued many other significant cases in both the Supreme Court and the lower courts involving novel and important legal issues concerning the conduct of the War on Terror.

The Office of the Solicitor General is responsible for conducting all litigation on behalf of the United States in the Supreme Court, and for supervising litigation in the federal appellate courts. Oral arguments for the 2007 Supreme Court term were completed in April 2008. The Department will

submit all of its briefs for action during this term by the end of May 2008.

Prior to today's announcement, Clement informed the President and the Attorney General of his plans to resign.

Let me just note several things. First, I still very strongly believe that Paul Clement is the guy about whom Sidney Blumenthal wrote last year,

Yet another Bush legal official, even now at the commanding heights of power, admits that the administration's policies are largely discredited. In its defense, he says without a hint of irony or sarcasm, "Not everything we've done has been illegal." He adds, "Not everything has been ultra vires" – a legal term referring to actions beyond the law.

That is, as early as last June (I suspect) Paul Clement recognized he was on sinking ship—and recognized that a good many things the Bush Administration had done were illegal.

The release—by noting that SCOTUS is all done for the year, save waiting for final briefs, which are all due before Clement leaves on June 2—suggests Clement simply picked his departure based on the SCOTUS season. Though it's not that different from the timing of Ted Olson, and he reportedly left because he was miffed that the Administration hadn't shared some of the OLC opinions (given the timing, probably relating to torture) that Olson got stuck defending.

But consider these other events that, by leaving at the beginning of June, Clement will avoid any association with:

June 23: Hearing before Judge John Bates on Contempt for Harriet Miers and Josh Bolten

SCHEDULING ORDER: Plaintiff's motion for partial summary judgment due by

4/10/2008. Defendants' opposition thereto, along with any dispositive cross-motions, due by not later than 5/9/2008. Plaintiff's reply in support of partial summary judgment, along with any opposition to the dispositive cross-motions, due by not later than 5/29/2008. Defendants' reply in support of any dispositive cross-motions due by not later than 6/12/2008. Motion Hearing set for 6/23/2008 10:00 AM in Courtroom 8 before Judge John D. Bates. SEE TEXT OF THE ORDER FOR MORE DETAILS. SO ORDERED. Signed by Judge John D. Bates on 3/21/08. (lcjdb1) (Entered: 03/21/2008)

Normally, I wouldn't think this hearing would be resignation-worthy. After all, John Bates tends to bend the law in favor of this Administration. He just told the Democrats to hold off (until June 24) on suits against McCain for breaking his own damn campaign finance laws. He's the guy who dismissed the suit against Cheney's Energy Task Force. And he's the guy who dismissed the Wilsons' suit against all the Administration officials who deliberately outed Valerie. So it's not like Clement has to worry about a tough hearing (and he probably wouldn't argue this one anyway).

But the Administration's case for invoking privilege was based on a particularly specious Clement opinion.

Paul Clement, in his explanation of why BushCo could invoke executive privilege in the USA scandal, claimed that the President has "nondelegable Presidential power" "to nominate or to remove U.S. Attorneys." It's a claim repeated (though in more humble form) by Fred Fielding in his invocation of executive privilege.

In the present setting, where the President's authority to

appoint and remove U.S. Attorneys is at stake, the institutional interest of the Executive Branch is very strong.

[snip]

Your letter does not dispute these principles.

[snip]

The letter does not challenge the exclusive character of the President's appointment and removal power, nor does the letter attempt to establish a constitutional basis for the Committees' inquiry into this matter.

Now, IANAL. But, particularly given Fielding's retreat on this issue, I believe BushCo is on shaky ground on this issue and the Democrats really need to start pointing that out. After all, the **Constitution itself** disputes Clement's and Fielding's claims that Bush's appointment power is non-delegable and exclusive.

but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

But don't take my word for it. This whole scandal started when BushCo had Brett Tolman sneak a provision into the PATRIOT Act to take appointment power away from judges and give it to the AG. In other words, the history of this scandal itself proves Clement and Fielding's claim to be false, because it proves Congress does have the authority

to dictate how appointments are made (and BushCO didn't make a squeak of complaint when Congress rearranged the appointment powers last year).

This kind of puts Clement in the realm of John Yoo-type hackery—arguments so bad that my sorry old NAL arse can poke big holes through them. This is probably not why Clement wants out before June—but you never know. It was a pretty crappy argument.

June 5: Khalid Sheikh Mohammed Shows Up for His First Show Trial Appearance

This date I find much much more likely to have caused Clement's departure.

The chief judge of the Guantánamo Bay war court has set June 5 for the first court appearances of reputed 9/11 mastermind Khalid Sheik Mohammed and four alleged co-conspirators.

The judge, Marine Col. Ralph Kohlmann, notified military defense attorneys by email Wednesday afternoon that he would preside over the case himself. He scheduled arraignment of the five men at the U.S. Navy base in southeast Cuba.

That date is likely to precede a U.S. Supreme Court ruling on whether Guantánamo detainees are entitled to challenge their detention in civilian courts, expected in late June before the high court ends this year's term.

Mind you, it's not like Clement would have to go before the Show Trial to represent the government in this hearing, either. But if I were the kind of lawyer particularly attuned to how many things the President I worked for did that were illegal, I might want to have nothing to do with the Gitmo show trials.

Of course, I could be totally wrong. Perhaps Clement just wants to spend time with his family

(though the press release thankfully spared us that sorry excuse).