

# DELAYING THE RETURN OF THE RULE OF LAW

Anonymous Liberal asks why AG Mukasey is refusing to turn over the new "family jewels"—the OLC opinions authorizing torture and warrantless wiretapping. Now, as a lawyer, AL is challenging the legal basis to withhold those opinions. But I'm interested in the tactical reason Mukasey is withholding those opinions.

## **Delaying the OLC Opinions and Holder's Nomination**

I would suggest we think about the timing—not only of this refusal, but also recent GOP attempts to stall Eric Holder's confirmation process.

As Pat Leahy laid out in a statement, the Republican response to early discussions of Holder's nomination were quite supportive.

In my statement to the Senate on November 20, I commended Senators Hatch, Sessions, Coburn, and Grassley for their nonpartisanship when they praised his selection. Senator Hatch spoke of his support for Mr. Holder, his experience and reputation. Senator Sessions, a former prosecutor, U.S. Attorney, and State Attorney General who is well aware of the problems at the Justice Department, said he was disposed to support him. Senator Coburn called it "a good choice." In addition, Senator Grassley has acknowledged Mr. Holder's impeccable credentials while reserving judgment.

But in the last week, Specter and the Republicans have been squawking to postpone Holder's nomination hearings beyond the January 7 and 8 timeframe when Leahy has them scheduled. They promise, they say in mock good faith, that Holder will be considered and probably approved

within a week or so of when Obama takes office on January 20. But with their actions, they're still calling for what amounts to at least a one-week delay in Holder's swearing in.

So Republicans are now attempting to orchestrate at least a one week delay in the time when Holder becomes Attorney General, to January 27 or thereabouts.

Mukasey's refusal to turn over the OLC opinions looks like it may cause the same kind of delay. The first report of the delay on OLC opinions—based on a December 3 Mukasey press conference—pointed specifically to the inauguration as the day when they might be turned over.

But the Justice Department's new leaders may not gain access to the Bush administration's most sensitive legal opinions until after the January inauguration, Mukasey told reporters in what could be his final news conference.

And the same report included an interesting paragraph tying Mukasey's refusal to "provide guidance" to Holder to early approaches on the terrorist program.

Mukasey said he has yet to meet Eric H. Holder Jr., the former federal prosecutor nominated Monday by Obama to take the nation's top law enforcement job. Yesterday, Mukasey refused a request to provide advice to his likely successor, instead pointing out that the department had changed in orientation since the terrorist attacks seven years ago.

In the context, this seems to tie to those opinions, which after all reflect the department's "orientation" during the early days after 9/11.

But the effect is the same: Mukasey appears to

be attempting to avoid talking to Holder about anything pertaining to those opinions. The two delay tactics—over Holder's nomination and over the opinions—would have the coordinated effect of ensuring that the new Attorney General will know nothing about those opinions until late January at the earliest.

I would suggest these potentiall coordinated delays may be related to one of two things.

### **The Telecom Immunity Lawsuit**

First, consider one more issue of timing that might be related. On December 2, Judge Vaughn Walker held a hearing on the EFF's lawsuit challenging the legality of granting the telecoms immunity via Congressional action. We know that Vaughn Walker is very skeptical of the legal basis for immunity. And significantly, one of Walker's biggest questions is why he should dismiss the suits against the telecom companies now, when we've got a new Attorney General coming in, who might judge the program to be illegal (which would then scuttle the immunity deal).

Justice Department attorney Carl Nichols didn't get through his first full sentence defending the constitutionality of retroactive immunity for spying telecom carriers before U.S. district judge Vaughn Walker interrupted to ask about President-elect Barack Obama.

"We are going to have new attorney general," Walker interjected in Tuesday morning's hearing in a San Francisco courthouse. "Why shouldn't the court wait to see what the new attorney general will do?"

[snip]

"The Department of Justice rarely, if ever, declines to defend the constitutionality of a statute," Nichols said. "It's very, very unlikely for a future DOJ to decline to defend the

constitutionality of this statute."

Again, note the timing, on December 2, Nichols represented to Walker that Obama's Administration wouldn't defend the FISA amendments. But the WaPo reported on December 3 that Mukasey was refusing to advise Holder, presumably about precisely these issues [ed.: fixed "wouldn't" for "would," thanks Mary].

Recall that, in order to get immunity, the telecoms must get the Attorney General to certify that the program they participated in was legal. By delaying the time when Holder will get those opinions, Republicans are making it much more likely that Judge Walker will rule on immunity before Holder can declare the program illegal.

(Note, Walker has not indicated in the minutes from the hearing when he will rule on the EFF challenge to immunity.)

### **Pardons**

The other reason the Administration may be delaying turning over the OLC opinions is to give Bush time to pardon the torturers (and, potentially, John Yoo and the like).

Sure, Mukasey's talking boldly about how the torturers—and specifically those who wrote the opinions—won't need a pardon.

"There is absolutely no evidence that anybody who rendered a legal opinion . . . did so for any reason other than to protect the safety of the country and in the belief he or she was doing something lawful," Mukasey said. "In those circumstances, there's no occasion to consider prosecution or pardons."

But note his emphasis on those who "rendered a legal opinion."

If Mukasey is so certain the people who wrote those opinions were acting legally, then why

won't he turn them over until after such time as Bush will have given his last minute pardons?

The refusal to turn over both the wiretap opinions and the torture opinions almost makes me believe there's an opinion there that emphasizes avoiding legal consequences as distinct from protecting the country, huh?