

OLC RESTORES 4TH AMENDMENT AFTER HOUNDING FROM CONGRESS

In her post on Steven Bradbury's October 6, 2008 OLC opinion withdrawing the October 23, 2001 OLC memo eviscerating the 4th Amendment, Christy asks some important questions.

In fact, it reads like a thinly veiled, but ever-so-politely worded, call of "bullshit."

It's laugh out loud funny. Or would be if it weren't for the fact that it took more than 7 years to issue it – during which time the government was still operating under the craptastic legal assumptions, one presumes.

Why was this kept hidden?

I've got a pretty good answer why Bradbury's opinion was kept hidden.

In the exchange between DiFi and Michael Mukasey above—which took place on April 10, 2008—Mukasey equivocated, badly, about whether or not that October 23, 2001 opinion remained in force.

DiFi: Is this memo in force? That the Fourth Amendment does not apply in domestic military.

Mukasey: The principle that the Fourth Amendment does not apply in wartime is not in force.

DiFi: No. The principle that I asked you about? Does it apply to domestic military operations? Is the Fourth Amendment, today, applicable to domestic

military operations?

Mukasey: [unclear] don't know of domestic military operations being carried out today.

DiFi: I'm asking you a question. That's not the answer. The question is, does it apply?

Mukasey: I'm unaware of any domestic military operations being carried out today.

[back and forth]

Mukasey: The Fourth Amendment applies across the board regardless of whether we're in wartime or in peacetime.

[snip]

Mukasey: In my understanding it is not operative.

Well, it turns out it took another six months for Bradbury to withdraw the opinion.

Given Mukasey's equivocations, I'd say there's a very good reason they hid the memo (and, by association, the evidence that it had not been withdrawn when Mukasey equivocated wildly). I'd also suggest that, Mukasey knew well of a domestic military operation—DOD's NSA wiretapping Americans domestically—that was ongoing at the time. And which, until the passage of the FISA Amendment Act, may well have been relying on Yoo's October 2001 memo for legal cover.