

ANOTHER ADMINISTRATION WITHHOLDING OLC MEMOS

I'm going to have a few posts on answers Eric Holder gave to the Senate Judiciary Committee's Questions for the Record submitted after his last appearance in November 2009.

Two of the questions (one from John Kyl and the other from Tom Coburn) asked whether Gitmo detainees brought to the United States for civilian trial would get additional constitutional rights. Both Senators asked Holder for details on OLC opinions on whether this would happen.

Though Holder did point to a public document (it's the last several pages of his response packet) laying out the risks that courts would require even military commissions to grant such constitutional rights, he refused to let Congress see the OLC memos in question. Here's Kyl's question and response.

Prosecution of Khalid Sheikh Mohammed and Other 9/11 Conspirators in Federal Court :

68. Now that the Administration has made a final decision to bring Khalid Sheikh Mohammed and other 9/11 conspirators to the United States for prosecution, please provide this Committee with any memoranda written by the Office of Legal Counsel articulating what additional constitutional and statutory rights detainees may receive by virtue of their presence in the United States that are not currently available to them at Guantanamo.

Response: Please find attached a memorandum concerning the application of

the Due Process Clause of the Fifth Amendment to military commission proceedings in the United States and at the Guantanamo Bay Naval Base, which the Department of Justice previously provided in response to a congressional inquiry (Attachment 3). The Department would have substantial confidentiality interests in any other memorandum that OLC or other components might have prepared on this topic.

As I said, Coburn asked a similar question and got an identical response.

Now, I get a weird spidey-sense every time DOJ refuses to show members of Congress who have an oversight role the OLC memos that DOJ has written. Even if these memos say Khalid Sheikh Mohammed would have the right to free health care and a shiny new pony the moment he was taken off a plane in the continental US, I still think Committee Members with a proper oversight interest ought to be able to see these memos.

But I gotta say, I also suspect there's a reason they're so insistent on not only the existence of memos, but also their right to see them. Is it possible that Bradbury or Yoo or someone wrote up a KSM's shiny pony memo before they left DOJ as one more justification for keeping Gitmo open indefinitely? Are they hoping to flush out another of the hack memos written under the Bush Administration?