

DOJ STILL DELIBERATING ABOUT 2006 WHITE PAPER

As I noted in my last post, the Obama Administration is following Bush Administration precedent in shielding OLC memos from Congressional oversight.

The Kyl and Coburn requests for OLC memos on any rights Gitmo detainees would get if brought into the US were not the only questions about OLC memos posed to Eric Holder after his November 2009 appearance before the Senate Judiciary. Russ Feingold raised an issue he always raises during oversight hearings: the still-operative OLC memos authorizing warrantless wiretapping.

Office of Legal Counsel White Memos:

20. In your October 29, 2009, responses to Questions for the Record from the June 17, 2009, Department of Justice Oversight hearing, you stated that there was an ongoing review of whether to withdraw the January 2006 White Paper and other classified Office of Legal Counsel (OLC) memos providing legal justification for the NSA's warrantless wiretapping program. What is the current status of that review? When will it be complete? Has anyone at the Department made an affirmative decision to leave those opinions in effect?

Response: The Department is still conducting its review, and will work with you and your staff to provide a better sense of the timing of the completion of the review. No one in the Department has made any affirmative decision about the treatment of the OLC opinions.

This is the White Paper based largely on a May

6, 2004 Jack Goldsmith opinion written after the hospital confrontation and designed to replace Yoo's expansive claims to inherent authority with an argument that the AUMF authorized the warrantless wiretap program. And according to Holder, DOJ is still dithering around with the question of whether they need to withdraw the memo.

Presumably, that decision is being made at least partly at OLC. You know—OLC? The department Dawn Johnsen should be running?

And I find that curious because, while I have no idea what Acting OLC head David Barron thinks of the January 2006 White Paper, we do know what another key OLC attorney thinks about it. While still at Balkinization, Marty Lederman repeatedly explained why the AUMF could not be claimed to have authorized the warrantless wiretap program. In February 2006, Lederman was one of a number of lawyers who wrote Congress explaining that the AUMF argument made no sense. In March 2006, Lederman wrote a long post analyzing what David Kris—now AAG for National Security—said in arguing that the AUMF couldn't justify the warrantless wiretap program.

Yet, in spite of the fact that two of the DOJ's key people believe this White Paper to be bogus, DOJ is still trying to figure out whether they need to withdraw it.