OLC LOWERS ITS STANDARDS FOR RETROACTIVE LEGAL REVIEWS

There's an interesting passage in the DOJ IG discussion of Jack Goldsmith's efforts to rewrite the Stellar Wind OLC memos (PDF 456).

The first passage describes Jim Comey permitting a lower standard of review to apply for activities already in process.

> In explaining the rationale for the revise opinion, Comey described to the OIG his view of two approaches or standards that could be used to undertake legal analysis of government action. If the government is contemplating taking a particular action, OLC's legal analysis will be based on a "best view of the law" standard. However, if the government already is taking the action, the analysis should instead focus on whether reasonable legal arguments can be made to support the continuation of the conduct.137
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> 137 Goldsmith emphasized to us that this second situation almost never presents itself, and that OLC rarely is asked to furnish legal advise on an ongoing program because the pressure "to say 'yes' to the President" invariably would result in applying a lower standard of review. Goldsmith stated that OLC's involvement in Stellar Wind was "unprecedented" because OLC is always asked to review the facts and formulate its advice "up front."

If it was unprecedented on March 1, 2004, it quickly became common.

After all, Goldsmith was asked to consider how the Geneva Convention applied to various types of detainees in Iraq, after the Administration had already been and continued to render people out of that occupied country. And he was also in the midst of a review of the torture program.

Indeed, Daniel Levin, who would go on to reconsider torture approvals until Cheney booted him out of the way to have Steven Bradbury rubberstamp things, would have been a part of those discussions.

So when, in fall 2004, he was asked to reconsider torture, that lower standard of review would have been in his mind.

You could even say that this standard of review gave CIA an incentive to start and continue torturing Janat Gul, on whom they pinned their need to resume torture, even after they accepted he was not, as a fabricator had claimed, planning election year plots in the US. So long as they tortured Gul, Levin would be permitted to apply a lower standard to that torture.

In any case, if this was unprecedented then, I suspect it's not anymore. After all, by the time David Barron first considered the drone killing memo for Anwar al-Awlaki, the Administration had apparently already tried to kill him once. And the Libyan war had already started when OLC started reviewing it (though they made a heroic effort to rule it illegal, which is a testament to just how illegal it was).

With regards to the Stellar Wind OLC, the discussion of what Goldsmith found so problematic is mostly redacted. Which is why I'm interested in his opinion that "'we can get there' as to [redacted] albeit by using an aggressive legal analysis." That says that one of the things his opinion would approve — either the content collection of one-end foreign communications or the dragnet collection of telephone metadata — involved "aggressive legal analysis" even to meet this lower standard.

It'd sure be nice to know which practice was

considered so marginally legal.