WILL DOJ FINALLY FINISH ITS "REVIEW" OF FAULTY WHITE PAPER ON ILLEGAL WIRETAPPING ON MONDAY?

Steven Aftergood reports that, as of December 10, DOJ was still "reviewing" the flawed January 2006 white paper that the Bush Administration used to retroactively claim the 2001 Authorization to Use Military Force also authorized Bush to ignore FISA.

> In June 2009, Senator Russ Feingold (D-WI) asked the Obama Administration to rescind certain classified legal opinions issued by the Justice Department Office of Legal Counsel (OLC) that asserted legal justifications for the Bush Administration's warrantless wiretapping program.
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> But more than a year and a half later, those OLC opinions remain under review and no action has been taken to invalidate them, the Justice Department indicated in a newly published hearing volume.
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> In a December 2010 response (pdf, at pp. 29-30) that has just been published, DOJ repeated that "The Department is still conducting its review, and will work with you and your staff to provide a better sense regarding the timing of the completion of the review." (at pp. 29-30)

Now, Aftergood suggests that, without Feingold around to nag DOJ twice a year, this is where things will remain, with the white paper under permanent review (sort of the same way torture is under permanent "investigation").

> But a review that continues indefinitely is practically indistinguishable from no review at all. And since Senator Feingold has now left the Senate, the Department will not be working with him and his staff to resolve this issue. All that remains is the Senator's warning about the hazards of embracing "unsupportable claims of executive power."

And he may well be right.

But I wonder whether, some time years from now, we will learn that DOJ ended up completing its review and deciding to keep the white paper around about next Monday, March 7.

After all, Feingold was likely not the only one nagging DOJ to ditch the white paper.

David Kris was probably doing so too.

Even as the white paper was being written, now Assistant Attorney General for National Security David Kris tried to persuade members of the Bush Administration their effort to legitimize the program was problematic. And within two weeks after the white paper was released, Kris wrote a very clear debunking of the white paper. He demolished the Administration's effort to claim AUMF authorized the program.

> In sum, I do not believe the statutory law will bear the government's weight. It is very hard to read the AUMF as authorizing "electronic surveillance" in light of the nearly simultaneous enactment of the Patriot Act. It is essentially impossible to read it as repealing FISA's exclusivity provision. And the AUMF suffers further in light of

> FISA's express wartime provisions. Even with the benefit of constitutional avoidance doctrine, I do not think Congress can be said to have authorized the NSA surveillance.

And while his final conclusion was more gentle, predicting the program would be "met with … hostility," Kris made it clear that, though he didn't know all the facts about the program, it was probably constitutionally suspect.

So I would imagine Kris has been pushing DOJ to "review" this dubious white paper since he rejoined DOJ.

But Friday is his last day. With Marty Lederman's departure last summer and Dawn Johnsen's abandonment by the Administration, Kris' departure will mean the last of the noted defenders of the rule of law will be gone from DOJ. Along with Russ Feingold, seemingly the last real defender of the Constitution in Congress.

So Monday morning, nothing—no one—will be there to stop DOJ from simply declaring "Mission Accomplished" of making the white paper, rather than Congressionally-passed statute, the law of the land.