I DON'T THINK "EXCLUSIVITY" MEANS WHAT JOHN YOO THINKS IT DOES

I wanted to focus some attention on one tiny part of the interchange I highlighted yesterday. In the guise of explaining to Administraton apologist David Rivkin the Kafkaesque process by which he has gotten some of the Office of Legal Counsel's opinions declassified, Sheldon Whitehouse revealed he has been trying to get one more opinion declassified—one relating to exclusivity:

> I'd be delighted to show you the whole rest of the opinion [stating that the President tells DOJ how to interpret law] but I'm not allowed to. It's classified. I had to fight to get these declassified. They made me take … they kept my notes. They then delivered them to the intelligence committee where I could only read them in the secure confines of the intelligence committee and then I had to, again, in a secure fashion, send this language back to be declassified. I'm doing it again with a piece of language that relates to exclusivity. **There is a sentence that describes whether or not the FISA statute's exclusivity provision is really exclusive enough for the OLC and that is, we're still going through this process**. I'd like to be able to tell you more about this.

Exclusivity, you'll recall, refers to the language in the original FISA bill that requires that FISA be the only means under which the executive branch conducts domestic surveillance. Here's Anonymous Liberal on exclusivity:

> Perhaps the most important provision in the entire FISA legal framework is 18 U.S.C. § 2511(2)(f)—commonly known as the exclusivity provision—which states that the "procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted."
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> It is through this provision that Congress made it clear that FISA's warrant requirement and other procedures were mandatory and that it did not intend to leave the president with any residual authority to conduct warrantless surveillance outside of the FISA framework.

Now, as AL points out, the Protect America Act introduced a loophole by which the Administration could get around the exclusivity provision, one DiFi has been trying to ensure stays closed in the amended FISA, and which the Administration hopes to keep open. But what Whitehouse seems to be pointing to is the means by which the Administration dismissed the clear requirement that FISA be the only (that is, exclusive) means by which the Administration could tap Americans. We know the Administration, when pushed, claimed that the Authorization for Military Force was legislation that superseded FISA, but Tom Daschle has clearly debunked that cute little legal theory.

Given this little tidbit from Whitehouse, it appears there's some more John Yoo (presumably) sophism designed to suggest that exclusivity doesn't mean exclusivity.