

Former Justice Department official describes illegal actions by Bush administration in defense of domestic spying

By Joe Kay
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In congressional testimony on Tuesday, a former top Justice Department official described how White House officials resorted to extraordinary actions to defend the administration's illegal warrantless domestic wiretapping program. The testimony provides a portrait of an administration that operates outside of the law in the prosecution of a historically unprecedented attack on democratic rights.

Former Deputy Attorney General James Comey spoke before the Senate Judiciary Committee, answering questions from New York Democrat Charles Schumer. Comey gave details of a dispute between the White House and high-ranking officials in the Justice Department, including then-Attorney General John Ashcroft, over the National Security Agency (NSA) warrantless electronic surveillance operation initiated by executive order shortly after the September 11, 2001 attacks. The dispute was first reported in the press in early 2006, but only in its broad outlines.

The wiretapping program involves spying on international phone calls and emails by people in the United States without the benefit of a court-issued warrant, in violation of the 1978 Foreign Intelligence Surveillance Act (FISA). It was so blatantly illegal that it provoked sharp opposition within the Justice Department, with Bush-appointed Ashcroft and Comey refusing to certify the program's legality when it was up for reauthorization in 2004.

Comey was at the time (early March 2004) the acting attorney general, because Ashcroft was incapacitated following surgery for pancreatitis. Comey described how White House officials, angered by his refusal to certify the program's legality, sought to pressure Ashcroft behind Comey's back to give his approval. Those most directly involved were then-White House Counsel and current Attorney General Alberto Gonzales and then-White House Chief of Staff Andrew Card, backed by Vice President Dick Cheney.

"I was concerned that this was an effort to do an end-run around the acting attorney general and to get a very sick man to approve something that the Department of Justice had already concluded—the department as a whole—it was unable to certify as to its legality," Comey testified.

Comey did not give details on the nature of the Justice Department's objections, nor what was eventually done to mollify its concerns. He refused even to explicitly confirm that he was speaking about the NSA program, citing its classified nature.

The dispute between the Justice Department and the White

House emerged after a review by the Justice Department's Office of Legal Counsel found that there was no legal foundation for the spying program.

In line with previous discussions with Ashcroft and the recommendations of the department, Comey refused to give his approval. The details of what happened next provide a picture of the type of methods employed by the White House, even against opponents within the administration itself.

Ashcroft's wife, who had banned visitors to Ashcroft while he was recovering from surgery, called Ashcroft's assistant on March 10, 2004 to inform him that she had received a call, and that Card and Gonzales would be visiting the disabled attorney general. Asked who made this call to Ashcroft's wife, Comey testified, "I have some recollection that the call was from the president himself, but I don't know that for sure. It came from the White House."

Comey, informed by Ashcroft's assistant of the pending visit, moved quickly to intervene. Jumping into his car, he "told my security detail that I needed to get to George Washington Hospital immediately. They turned on the emergency equipment and drove [with emergency lights flashing and siren blaring] very quickly to the hospital." Arriving at the hospital he "literally ran up the stairs with my security detail."

Comey was clearly concerned that Card and Gonzales would pressure a half-conscious Ashcroft to sign onto the spying program without fully realizing what he was doing. Comey, however, arrived at Ashcroft's hospital bed first. "I immediately began speaking to him," Comey testified, "trying to orient him as to time and place, and trying to see if he could focus on what was happening, and it wasn't clear to me that he could. He seemed pretty bad off."

Comey was so concerned that the White House officials would resort to thuggish behavior he called then-FBI Director Robert Mueller and had Mueller instruct the FBI agents present in Ashcroft's room "not to allow me to be removed from the room under any circumstances."

After a few minutes, Gonzales and Card arrived, and Gonzales began speaking with Ashcroft, asking him to reauthorize the program. Ashcroft refused, on the basis of the discussion with Comey and previous discussions in the Justice Department. According to Comey, "As he laid back down, he said, 'But that

doesn't matter, because I'm not the attorney general. There is the attorney general,' and he pointed to me ... The two men did not acknowledge me. They turned and walked from the room."

Shortly after this interview, Card called Comey and demanded that he attend a meeting in the White House that evening. Again evidently convinced that the White House would resort to thuggish or underhanded methods, he insisted that he would not meet at the White House without a witness, choosing Theodore Olson, the solicitor general.

Unable to secure Comey's support, the White House decided to go ahead with the program anyway. "The program was reauthorized without us and without a signature from the Department of Justice attesting as to its legality," Comey said.

This is an extraordinary revelation. The Bush administration, in violation of the legal opinion of its own Justice Department—presumably responsible for upholding the law—went ahead with a program that involves unprecedented attacks on the democratic rights of the American people.

In response to this move, Comey says that he, Ashcroft and Mueller prepared to resign from the administration. This evidently prompted the White House to engage in some damage control to prevent an open rupture. Bush held a personal meeting with both Comey and Mueller, and some sort of arrangement was worked out to allow the spying program to continue, with the Justice Department officials giving their formal approval a few weeks later.

Comey would not give any details about what the nature of this agreement was, but it did not involve any fundamental changes to the program, which has continued to be used to spy on Americans without warrants. Indeed, the very existence of the program was not revealed until December of 2005.

This testimony speaks volumes about the modus operandi of the Bush administration. Comey was a top official in the administration. He was intimately familiar with the types of methods used by the White House, and his response in the dispute with Gonzales and Card was no doubt based on his prior experiences.

The *Washington Post*, in an editorial on Wednesday, spoke of a "lawlessness so shocking that it would have been unbelievable coming from a less reputable source." This is indeed the basic character of the Bush administration—in its handling of domestic spying, the war in Iraq, and every other aspect of its policy.

The incident also underscores the illegality of the program itself. Ashcroft, one of the principal architects of the Patriot Act and similar legislation, is not known for his defense of democratic rights. That he, Mueller and Comey felt they had to oppose the White House is an indication of how unprecedented the new spying measures of the Bush administration were.

A year-and-a-half after the NSA spying program was first revealed to the public, its breadth and depth still remain unknown. What is clear, however, is that the Bush administration has begun compiling vast databases of phone calls, phone records, emails and other communications in violation of the FISA Act.

In 2006, a US Federal court ruled the NSA program unconstitutional and illegal, a decision that is currently under appeal. Meanwhile, the Bush administration is seeking

Congressional approval for changes in the FISA Act that would expand government powers. The White House continues to insist, however, that whatever the law, the president has the constitutional authority as commander-in-chief to spy on the American people.

There are ample grounds for impeaching everyone involved in implementing these policies, including the president and vice president. Arlen Specter, the lone Republican senator to attend the hearing on Tuesday, noted that the story "has some characteristics of the Saturday Night Massacre." He was referring to Nixon's dismissal of the special prosecutor into the Watergate scandal Archibald Cox, and the subsequent resignations of the attorney general and the deputy attorney general.

The Saturday Night Massacre led eventually to the initiation of impeachment proceedings and the subsequent resignation of Nixon. In fact, the lawlessness of the Bush administration makes the actions of Nixon in Watergate look like petty theft.

In spite of this, very little has been made by the Democratic Party of the illegal spying program and the broader attacks on democratic rights, and there have been no serious calls for impeachment. On the contrary, Democratic congressional leaders such as House Speaker Nancy Pelosi have insisted repeatedly that there will be no move to impeach Bush, and this stance has been publicly defended by a number of so-called "anti-war" Democrats in Congress.

In fact, the Democrats do not have any principled disagreements with the Bush administration's attack on the democratic rights of the American people.

It should be recalled that Senate Democrats helped give NSA chief Michael Hayden, who oversaw the illegal domestic spying program, a 78-15 confirmation vote to head the Central Intelligence Agency in May 2006, and they refused to filibuster Gonzales' nomination to head the Justice Department in February 2005. Among those voting for Hayden was Charles Schumer.

Since they took control of Congress in January, the Democrats have said next to nothing about the NSA spying program and other unconstitutional domestic surveillance operations. Comey himself was called to testify in connection with the scandal surrounding the firing of US attorneys, not NSA warrantless wiretapping.

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