

Bush administration gets secret court's sanction for illegal spying operation

Bill Van Auken
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Faced with imminent Congressional and judicial review of an illegal warrantless wiretapping operation conducted by the National Security Agency (NSA) for more than five years, the Bush administration has sought and received approval from a secret court for continued eavesdropping.

The legal maneuver was revealed in a letter sent Wednesday by US Attorney General Alberto Gonzales to the Senate Judiciary Committee. The letter announced that the Justice Department had obtained from a single unnamed judge on the Foreign Intelligence Surveillance Court (FISC) orders allowing the continuation of the government's domestic spying operation.

"As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Federal Intelligence Court," Gonzales wrote.

Gonzales's letter came on the eve of his appearance at an oversight hearing of the Senate Judiciary Committee Thursday. Moreover, in just two weeks a federal appeals court in Cincinnati, Ohio is set to hear the government's appeal of a federal judge's ruling that its "Terrorist Surveillance Program" violated fundamental constitutional rights, represented an arrogation of unconstitutional powers by the president and was flatly illegal.

In announcing the FISC orders sanctioning the spying program, Gonzales reiterated the government's position that its previous warrantless wiretapping was perfectly legal.

The attorney general described the court's orders as "innovative" and "complex," while providing the "speed and agility that was provided by the Terrorist Surveillance Program."

During his appearance before the Senate Judiciary Committee Thursday, Gonzales refused to divulge any further information about these orders. And, while the chief judge of the secret intelligence court said that she was willing to provide Congress with copies of the orders, Gonzales told the Senate panel that he would block any such disclosure in the name of national security.

"There is going to be information about operational details about how we're doing this that we want keep confidential," he said. He refused to provide any details about the revamped spying program, claiming that to do so would expose intelligence sources and methods to "terrorists." He did say that Justice Department lawyers had worked to "push the envelope" in crafting the new procedures.

There remains considerable uncertainty about the nature of the secret agreement reached between the Justice Department and the

single FISC judge.

While Justice Department officials insisted that it did not represent a blanket endorsement of the program already being operated by the government, reports indicated that the orders were not carried out under normal FISC procedures, granting separate authorizations of individual wiretaps based upon submission of evidence showing probable cause to believe that suspects are implicated in terrorist activity.

Representative Heather Wilson, a Republican from New Mexico and a member of the House Intelligence Committee, told the *New York Times* that the judge's order did indeed represent a blanket "programmatic" sanction for the domestic spying operation.

Administration officials, she said, "have convinced a single judge in a secret session, in a nonadversarial session, to issue a court order to cover the president's terrorism surveillance program." The order, she added, did nothing to protect basic civil liberties violated by the administration's actions.

The *Washington Post* cited an unnamed government official familiar with the discussions between the administration and the FISC judge describing the orders as "'programmatic' rather than based on warrants targeting specific cases." The official also revealed that the orders were obtained not from the FISC panel's chief judge, Colleen Kollar-Kotelly, but from one of the rotating members of the court, assigned to hear that week's cases—undoubtedly someone cherry-picked by the administration to provide the legal cover it required.

While Gonzales claimed at the Senate hearing Thursday that the administration's submission brought it into compliance with FISA, this is far from clear. A blanket endorsement is not consistent with the law.

The attorney general said that the Justice Department had briefed the House and Senate intelligence committees on the new procedure, a contention that was denied by Democratic and Republican members on both panels.

Until now, the administration had maintained that the secret and extremely indulgent procedures enacted under the intelligence surveillance act (the attorney general is authorized to conduct searches and surveillance for up to 72 hours before seeking a warrant) represented an unacceptable impediment to the conduct of the "war on terror."

It insisted that in his role as commander-in-chief, Bush was entitled to bypass the court and ignore the law under which it was established. It further claimed the authorization of military force

passed by Congress after the September 11, 2001 terrorist attacks granted him the right to conduct such police-state operations within the US itself.

Initiated by the Bush administration in October 2001, the program remained secret until late 2005, when it was exposed in media reports.

During the run-up to the election, the Republican Party leadership waged a smear campaign declaring that anyone challenging Bush's illegal spying was "more interested in the rights of terrorists than in protecting the American people."

While this ploy did little for the Republicans at the polls, it did have the desired effect of intimidating the Democrats, who chose not to make the domestic spying operation an issue.

Now, it is clear from the administration's tactical retreat that the requirements of the Foreign Intelligence Surveillance Act (FISA) were no obstacle to its actions. The decision to bypass the court was driven not by the need for a speedy response to supposed terrorist threats, but rather by the determination of the right-wing clique in the White House to assume police-state powers and to roll back any and all obstacles in the way of presidential dictatorship.

FISA itself was passed in response to the revelations during the Watergate scandal of the Nixon White House's widespread use of the FBI and CIA to conduct covert spying on antiwar activists and critics of the administration.

After obtaining the court orders authorizing wiretapping, the Justice Department filed notice with the US Court of Appeals for the 6th Circuit that it intended to submit papers "addressing the implications of this development" for the case. Department officials will argue that the issues raised in the challenge to the illegal spying were "now moot."

In a decision issued last August, US District Judge Anna Diggs found the administration in violation of the First and Fourth Amendments to the Constitution, the constitutional principle of separation of powers and the 1978 FISA law.

"There are no hereditary kings in America and no powers not created by the Constitution," Judge Diggs said in her decision. Diggs ordered the NSA surveillance program halted, but the administration succeeded in obtaining a stay of this order while it was on appeal. Thus, the spying has continued without interruption.

The American Civil Liberties Union, the chief plaintiff in the suit against the NSA, argued that the case should go forward and voiced strong skepticism that the changes announced by the administration had brought it into compliance with the law.

"The NSA was operating illegally and this eleventh-hour ploy is clearly an effort to avoid judicial and Congressional scrutiny," Anthony Romero, ACLU executive director said in a statement. "Despite this adroit back flip, the constitutional problems with the president's actions remain unaddressed."

Ann Beeson, lead counsel in the case, added, "The legality of this unprecedented surveillance program should not be decided by a secret court in one-sided proceedings. And without a court order that prohibits warrantless wiretapping, Americans can't be sure that their private calls and emails are safe from unchecked government intrusion."

The administration's sudden turn to the surveillance court—after more than a year of claiming that such action would undermine the struggle against terrorism—was undoubtedly taken in large part in an attempt to derail judicial review of the NSA spying operation and, particularly, the unprecedented powers claimed by the Bush White House.

Similar actions have been taken in the face of imminent judicial review of illegal and quasi-dictatorial measures taken by the administration in the so-called war on terror, particularly surrounding the imprisonment without charges or hearings of "enemy combatants."

For example, when the US Supreme Court was on the verge of ruling on the unlawful detention of Jose Padilla, a US citizen declared an enemy combatant, the administration took him out of a Navy brig and had him criminally charged in order to prevent judicial ruling on its actions.

The decision to seek approval from the surveillance court was also undoubtedly motivated by the administration's desire to take the steam out of hearings on the NSA spying program planned in both houses of the new Democratic-led Congress.

There was some indication, given the complacency and spinelessness of the Democrats at Thursday's Senate Judiciary Committee hearing, that the maneuver may have the desired effect.

"This reversal is a good first step," said committee chairman Senator Patrick Leahy, a Democrat from Vermont. Leahy told Gonzales, "The issue has never been whether to monitor suspected terrorists, but doing it legally and with proper checks and balances. Providing efficient but meaningful court review is a major step toward addressing these concerns."

Sen. John Rockefeller of West Virginia, the new Democratic chairman of the Senate intelligence committee, said the decision to seek the court orders was "confirmation that the administration's go-it-alone approach, effectively excluding Congress and the courts and operating outside the law, was unnecessary."

There is in reality no evidence that the administration's legal side-stepping has done anything to lessen the profound threat to the democratic rights of the American people posed not only by the NSA wiretapping program, but by a plethora of spying and data-gathering operations that are laying the groundwork for a police state.

These operations are criminal in nature and represent a fundamental assault on the Constitution—in short impeachable offenses by the US president. While seeking pseudo-legal cover, the administration has not backed down in the slightest from its position that, as commander-in-chief, Bush has full authority to ignore or violate any law as he sees fit.



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