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Gonzales Defends Legality of Surveillance

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By William Branigin
Washington Post Staff Writer
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Attorney General Alberto R. Gonzales told a Senate committee today that a controversial surveillance program is "lawful in all respects" and that President Bush launched it under authority from both the Constitution and U.S. law.

But he said he could not give the panel "absolute assurance" that no one other than people linked to terrorists are being spied upon.

Appearing before the Senate Judiciary Committee to testify on what the administration calls a "terrorist surveillance program" run by the super-secret National Security Agency, Gonzales came under fire from committee Democrats, who characterized the program as illegal.

Gonzales cautioned against congressional efforts to deal with the controversy through legislation, warning that this could inhibit the president's ability to protect the country and result in leaks of confidential information.

Some Republicans on the committee expressed doubts about Gonzales's assertions of presidential authority to order the secret surveillance program.

The committee chairman, Sen. Arlen Specter (R-Pa.), told Gonzales he was "skeptical" of the claim that Congress authorized the eavesdropping program when it approved a resolution on the use of force against the perpetrators of the Sept. 11, 2001, terrorist attacks.

Sen. Lindsey O. Graham (R-S.C.) said it was "very dangerous" to make such claims, which he argued could make it more difficult for presidents in the future to obtain use-of-force resolutions from Congress.

The committee's top Democrat, Sen. Patrick J. Leahy (D-Vt.), told Gonzales, "We all agree that if you have al Qaeda terrorists calling, we should be wiretapping them." However, he added, "instead of doing what the president has the authority to do legally, he decided to do it illegally without safeguards."

Leahy also noted that the Foreign Intelligence Surveillance Act (FISA), passed in 1978 to regulate eavesdropping on foreign agents in the United States, has been amended five times since the Sept. 11 attacks "to give it more flexibility."

The hearing got off to a rocky start when Specter said he was allowing Gonzales to testify without taking an oath. Democrats objected, and the GOP majority on the panel voted to uphold the chairman's decision. Specter said later that Gonzales would be called back for a second day of questioning.

In an opening statement, Gonzales called the NSA program "an early warning system designed for the 21st century." He told the committee: "It is the modern equivalent to a scout team, sent ahead to do reconnaissance, or a series of radar outposts designed to detect enemy movements. And as with all wartime operations, speed, agility and secrecy are essential to its success." He said that "no other foreign intelligence program in the history of NSA has received a more thorough review" to ensure there are safeguards to protect the privacy of Americans.

Gonzales said the president approved the program under his authority in Article 2 of the Constitution, as well as under the authority of the 2001 force resolution, which he said was "very broadly worded" in authorizing Bush to use "all necessary and appropriate force" against the al Qaeda terrorist network.

Previous presidents, Gonzales argued, have "authorized the warrantless surveillance of the enemy during wartime" in ways "far more sweeping than the narrowly targeted terrorist surveillance program." He cited presidents Abraham Lincoln, Woodrow Wilson and Franklin D. Roosevelt and noted that Gen. George Washington authorized the interception of letters during the Revolutionary War.

"Now, we all agree that it's a necessary and appropriate use of force to fire bullets and missiles at al Qaeda strongholds," he said. "Given this common ground, how can anyone conclude that it is not necessary and appropriate to intercept al Qaeda phone calls? The term 'necessary and appropriate force' must allow the president to spy on our enemies, not just shoot at them blindly, hoping we might hit the right target."

He also pointed to a Supreme Court decision upholding the president's right to order the detention of enemy combatants even if they are U.S. citizens.

"If the detention of an American citizen who fought with al Qaeda is authorized by the force resolution as an incident of waging war, how can it be that merely listening to al Qaeda phone calls into and out of the country in order to disrupt their plots is not?" Gonzales asked.

Requirements under FISA to obtain warrants for such eavesdropping can be "cumbersome and burdensome," Gonzales said. "All of these steps take time. Al Qaeda, however, does not wait."

Gonzales warned in his opening statement that congressional action to end the surveillance program would "afford our enemy dangerous and potentially deadly new room for operation within our own borders."

In a separate written statement submitted to the committee, he charged that press accounts of the surveillance program "are in almost every case, in one way or another, misinformed, confused or wrong." He did not elaborate.

Leahy and other Democratic senators disputed Gonzales's assertions.

"The president's secret wiretapping program is not authorized by the Foreign Intelligence Surveillance Act," Leahy said. In addition, he said, the September 2001 congressional authorization to use military force "did not give the president the authority to go around the FISA law to wiretap Americans illegally" and "did not authorize domestic surveillance of citizens."

Leahy rejected what he said were Republican charges that Democrats seek "special rights for terrorists." On the contrary, he said, "of course I want them captured. . . . But my concern is the laws of America. My concern is when we see peaceful Quakers being spied upon, where we see babies and nuns who can't fly on

airplanes because they're on a terrorist watch list put together by your government."

Bush never sought additional legal authority from Congress to conduct "the type of domestic surveillance in which NSA has been secretly engaged in," and never told Congress "that FISA was inadequate, outmoded or irrelevant," Leahy complained. "You never did that until the press caught you violating the statute with this secret wiretapping of Americans without warrants."

In fact, Leahy noted, Bush said in 2004 that "a wiretap requires a court order. Nothing has changed. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."

Gonzales said later that Bush was referring to "roving wiretaps" under the Patriot Act when he made those remarks.

Asked by Sen. Joseph R. Biden Jr. (D-Del.) whether he could assure the panel that "no one is being eavesdropped upon in the United States" other than people communicating with a suspected terrorist abroad, Gonzales said, "I can't give you absolutely assurance of the kind that you've asked for." He said he could not discuss such "operational details" of the program.

In response to other questions, Gonzales declined to say whether the authority the president claims also applies to eavesdropping without a warrant on communications entirely within the United States.

Nor would he say whether the administration's interpretation of its authority would allow the government, for example, to open the mail of U.S. citizens.

Pressed repeatedly on why the Bush administration did not ask Congress to amend FISA if it felt the law were inadequate, Gonzales said Bush was convinced he had the necessary authority. Another concern, he said, was that "the legislative process may result in attempted restrictions upon the president's inherent constitutional authority and he may not be able to protect the country in the way that he believes he has the authority to do under the Constitution."

Gonzales also said "it is pretty difficult to keep certain information confidential" in the legislative process. "And I think I'm concerned that that process will inform our enemies about what we're doing here and how we're doing it."

Sen. Dianne Feinstein (D-Calif.), charging that Gonzales had advanced "a radical legal theory here today," asked whether Bush has ever invoked the authority he claims for any program other than the NSA surveillance program.

Gonzales refused to answer.

Sen. Graham told the attorney general, "This statutory force resolution argument that you're making is very dangerous in terms of its application for the future." He added, "When I voted for it, I never envisioned that I was giving to this president or any other president the ability to go around FISA carte blanche."

Graham said that "it would be harder for the next president to get a force resolution if we take this too far. And the exceptions may be a mile long."

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