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# Making Illegal Spying Legal

## Holder Refuses to Call Warrantless Spying Illegal

By David Swanson
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Theme: Law and Justice, Police State & Civil Rights

In probably the most disturbing testimony to hit Capitol Hill since Attorney General Eric Holder appeared before the House Judiciary Committee in May and refused to rule out lawless detention or to agree that government officials can sometimes be prosecuted for their crimes, on Wednesday Holder appeared before the Senate Judiciary Committee and, among much else, refused five times to agree that warrantless spying is illegal and unconstitutional. I spoke to Holder in April, and he assured me that I would be proud of my country. When?

Over the months that have passed since Holder last testified before the Senate Judiciary Committee at his confirmation hearings, it has become clear that most, if not all, of the major criminal activities of the Bush Administration will be covered up and protected, and in fact continued, by the Obama Administration — yes, including torture. Most recently in the media, including in Wednesday's New York Times, are accounts of ongoing warrantless spying. At Wednesday's hearing, liveblogged here, illegal spying was the subject of a dramatic exchange.

Chairman Patrick Leahy was the first to raise the topic and to complain that he had to learn about the executive branch's crimes from the New York Times. I'm not sure who he would prefer or expect to hear such things from. Holder, in response, claimed not to know anything about it, because he hadn't "reviewed in any detail" the New York Times article. Senators Tom Coburn and Diane Feinstein both claimed that the New York Times article was not accurate.

But whether that article is accurate or not misses the broader question that was then raised by Senator Russ Feingold. He pointed out that executive "opinions" asserting the legality of torture have been overturned, but that those asserting the legality of warrantless wiretapping have not been. Senator Feinstein asked whether the Office of Legal Counsel (OLC) "opinion" announcing that the 4th Amendment did not apply in the "war on terror" had been withdrawn. Holder said he did not know. Feingold pointed to past statements by Barack Obama and Eric Holder denouncing the warrantless wiretapping. And he asked Holder directly whether the warrantless wiretapping programs set up during Bush's presidency were illegal. Holder replied that they were "unwise". So Feingold asked again, and a third, fourth, and fifth time. Holder would go so far as to say "inconsistent with FISA" and yet explicitly refused to say "illegal." Holder said he hoped to someday release secret "opinions" on spying. But releasing something is not the same as overturning or "withdrawing" it. After five unsuccessful attempts to get Holder to call illegal spying illegal (even though Holder would, later in the same hearing, indicate his reliance on legislation that provided immunity for the crime), Feingold gave up and moved to another topic.

Feingold asked Holder about abuse of the "state secrets" privilege. Since February, Feingold said, he has sought a classified briefing from the executive branch to explain three cases in which Holder's department has used the "state secrets" excuse to try to block court cases. Feingold asked Holder to get him that briefing. Holder refused twice, but did claim that within "a matter of days" he would make some proposals public. The Senate Judiciary Committee plans on Thursday to mark up the State Secrets Protection Act, a bill to restrain executive abuse. Holder told the committee on Wednesday that the executive branch would release its position on the matter within days, and that then no legislation should be needed. Leahy appeared to agree to that outrageous assertion of power, saying that unless the position was released, his committee would mark up the bill.

Senator Dick Durbin asked Holder about the endlessly delayed report from the Office of Professional Responsibility (OPR), within the Department of Justice, on Jay Bybee's, John Yoo's, and Steven Bradbury's complicity in torture. Durbin pointed out that it has been six weeks since the comment period for the subjects closed (that is to say, Yoo and Bybee and Bradbury concluded their unprecedented and outrageous opportunity to submit edits to a report on their own wrongdoing). Holder told Durbin that changes are being made to the report as a result of those responses. He said that part of the report might be released in "a matter of weeks", but that other parts will be classified. Holder added that he believed the unclassified portion alone would give wrong impressions. He said that he would want to get more of the report declassified, but that doing so would take more time.

It's worth noting that leaders in both houses of Congress, including Leahy and his House counterpart Chairman John Conyers, have long since made clear that they will not seek to hold anyone accountable for torture until the OPR report is released. Presumably they mean the full report. And that could apparently be months or never. No doubt the assurances that all action will wait for the report is strong motivation to delay the report.

Senator Sheldon Whitehouse ran through the chronology of delays and stalling tactics thus far. He said that on February 18, 2008, he had been told the OPR report was underway, that a draft report had been delivered in December 2008, that on May 4, 2009, the comment period from the torture lawyers had ended, and that the CIA was given an opportunity for substantive comment and classification review. Whitehouse asked whether the CIA was the current logjam. Holder said No. He said that the OPR is still working on the report in light of the responses it received from the torturers six weeks ago. Whitehouse focused on the CIA and asked Holder (a number of times) if he had any assurances from the CIA that those giving input to the report were not themselves involved in the torture. Holder made clear that the answer was no. He has no such assurances and isn't interested in them.

Wednesday's hearing also featured an amicable exchange in which Holder and Senator Lindsey Graham discussed the creation of a "review" procedure that might amount to "due process" for prisoners who would be held forever without trial. Graham also asked for an assurance from Holder that the President would decree torture photos to be classified before (or after) the next court order to release them. On that point, Holder refused to make such a commitment. But then, he's not the president.

Holder did say something encouraging about the nature of OLC opinions. Senator John Cornyn, who is concerned to prevent the residents of Washington D.C. from having voting representation in Congress, said that an OLC opinion that a proposal for DC voting rights was unconstitutional had not been released. Pressed repeatedly, Holder ended up saying that OLC opinions are just recommendations that he has the power to ignore. Of course, this

should be true, but then Ashcroft, Gonzales, and Mukasey, not to mention Bush, had the same power and responsibility to reject absurd “opinions” that torture and warrantless spying and wars of aggression were legal.

*David Swanson is the author of the upcoming book “Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union” by Seven Stories Press. You can pre-order it and find out when tour will be in your town: http://davidswanson.org/book*



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