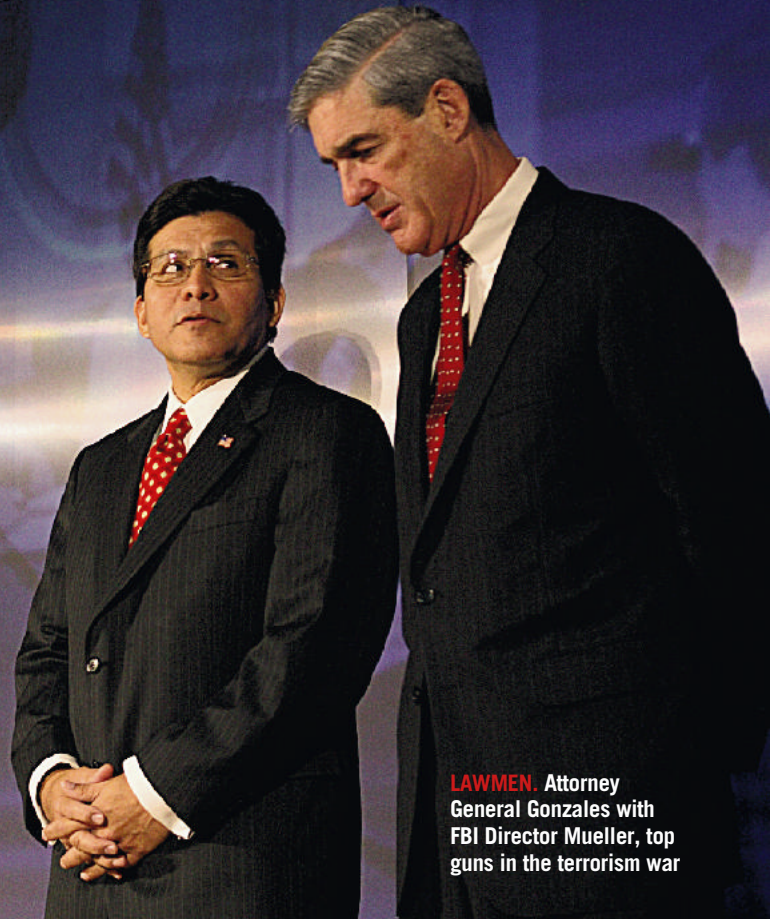


THE LETTER OF THE LAW

THE WHITE HOUSE SAYS SPYING ON TERROR SUSPECTS WITHOUT COURT APPROVAL IS OK. WHAT ABOUT PHYSICAL SEARCHES?



LAWMEN. Attorney General Gonzales with FBI Director Mueller, top guns in the terrorism war

By Chitra Ragavan

In the dark days after the Sept. 11, 2001, terrorist attacks, a small group of lawyers from the White House and the Justice Department began meeting to debate a number of novel legal strategies to help prevent another attack. Soon after, President Bush authorized the National Security Agency to begin conducting electronic eavesdropping on terrorism suspects in the United States, including American citizens, without court approval. Meeting in the FBI's state-of-the-art command center in the J. Edgar Hoover Building, the lawyers talked with senior FBI officials about using the same legal authority to conduct physical searches of homes and businesses of terrorism suspects—also without court approval, one current and one former government official tell *U.S. News*. “There was a fair amount of discussion at Justice on the warrantless physical search issue,” says a former senior FBI official. “Discussions about—if [the searches] happened—where would

the information go, and would it taint cases?”

FBI Director Robert Mueller was alarmed by the proposal, the two officials said, and pushed back hard against it. “Mueller was personally very concerned,” one official says, “not only because of the blowback issue but also because of the legal and constitutional questions raised by warrantless physical searches.” FBI spokesman John Miller said none of the FBI's senior staff are aware of any such discussions and added that the bureau has not conducted “physical searches of any location without consent or a judicial order.”

In December, the *New York Times* disclosed the NSA's warrantless electronic surveillance program, resulting in an angry reaction from President Bush. It has not previously been disclosed, however, that administration lawyers had cited the same legal authority to justify warrantless physical searches. But in a little-noticed white paper submitted by Attorney General Alberto Gonzales to Congress on January 19 justifying the legality of the NSA eavesdropping, Justice De-

RICK BOWMER—AP



UNDER SIEGE? Thomas Nelson, defending a terrorism suspect, says his home and office may have been searched.

asked Gonzales whether the NSA spying program includes authority to tap E-mail or postal mail without warrants. “Can you do black-bag jobs?” Leahy asked. Gonzales replied that he was trying to outline for the committee “what the president has authorized, and that is all that he has authorized”—electronic surveillance. Three weeks later, Gonzales amended his answer to Leahy’s question, stating that he was addressing only the legal underpinnings for the NSA surveillance program but adding: “I did not and could not address operational aspects of the program, or any other classified intelligence activities.” In the past, when Congress has taken up explosive issues that affect the bureau,

partment lawyers made a tacit case that President Bush also has the inherent authority to order such physical searches. In order to fulfill his duties as commander in chief, the 42-page white paper says, “a consistent understanding has developed that the president has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes.” The memo cites congressional testimony of Jamie Gorelick, a former deputy attorney general in the Clinton administration, in 1994 stating that the Justice Department “believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes.”

“Black-bag jobs.” Justice Department spokesman Brian Roehrka says the white paper cited the Gorelick testimony simply to bolster its legal defense of the NSA’s electronic surveillance program. Roehrka points out that Justice Department lawyers have told Congress that the NSA program “described by the president does not involve physical searches.” But John Martin, a former Justice Department attorney who prosecuted the two most important cases involving warrantless searches and surveil-

lance, says the department is sending an unambiguous message to Congress. “They couldn’t make it clearer,” says Martin, “that they are also making the case for inherent presidential power to conduct warrantless physical searches.”

It could not be learned whether the Bush administration has cited the legal authority to carry out such searches. A former marine, Mueller has waged a quiet, behind-the-scenes battle since 9/11 to protect his special agents from legal jeopardy as a result of aggressive new investigative tactics backed by the White House and the Justice Department, government officials say. During Senate testimony about the NSA surveillance program, however, Gonzales was at pains to avoid answering questions about any warrantless physical surveillance activity that may have been authorized by the Justice Department. On February 6, Patrick Leahy, the ranking Democrat on the Judiciary Committee,

Mueller has made it a point, officials have said, to leave Washington—and sometimes the country—so as not to get pulled into the political crossfire. When Gonzales testified February 6, Mueller was on his way to Morocco.

Government officials told the magazine that Mueller and then Deputy Attorney General James Comey, who also questioned the NSA spying program, both believed that while it was a close call legally, the president did have authority to conduct electronic surveillance of terrorism suspects in the United States without court approval; both men, however, raised grave concerns about the possible use of any information obtained from any warrantless surveillance in a court of law.

At least one defense attorney representing a subject of a terrorism investigation believes he was the target of warrantless clandestine searches. On Sept. 23, 2005—nearly three months before the *Times* broke the NSA story—Thomas Nelson wrote to U.S. Attorney Karin Immergut in Oregon that in the previous nine months, “I and others have seen strong indications that my office and my home have been the target of clandestine searches.” In an interview, Nelson said he believes that the searches



AT ODDS. James Comey, No. 2 in the Justice Department, dueled with David Addington (right), a top aide to Dick Cheney, over the law.



resulted from the fact that FBI agents accidentally gave his client classified documents and were trying to retrieve them. Nelson's client is Soliman al-Buthe, codirector of a now defunct charity named al-Haramain, who was indicted in 2004 for illegally taking charitable donations out of the country. The feds also froze the charity's assets, alleging ties to Osama bin Laden. The documents that were given to him, Nelson says, may prove that al-Buthe was the target of the NSA surveillance program.

The searches, if they occurred, were anything but deft. Late at night on two occasions, Nelson's colleague Jonathan Norling noticed a heavysset, middle-aged, non-Hispanic white man claiming to be a member of an otherwise all-Hispanic cleaning crew, wearing an apron and a badge and toting a vacuum. But, says Norling, "it was clear the vacuum was not moving." Three months later, the same man, waving a brillo pad, spent some time trying to open Nelson's locked office door, Norling says. Nelson's wife and son, meanwhile, repeatedly called their home security company asking why their alarm system seemed to keep malfunctioning. The company could find no fault with the system.

In October, Immergut wrote to Nelson reassuring him that the FBI would not target terrorism suspects' lawyers without warrants and, even then, only "under the most exceptional circumstances," because the government takes attorney-client relationships "extremely seriously." Nelson nevertheless filed requests, under the Freedom of Information Act, with the NSA. The agency's director of policy, Louis Giles, wrote back, saying, "The fact of the existence or nonexistence of responsive records is a currently and properly classified matter."

"Maximum speed." For the FBI, the very mention of the term "black-bag jobs" prompts a bad case of the heebie-jeebies. In 1975 and 1976, an investigative committee led by then Sen. Frank Church documented how the FBI engaged in broad surveillance of private citizens and members of antiwar and civil rights groups, as well as Martin Luther King Jr.

The committee's hearings and the executive-branch abuses that were documented in the Watergate investigation led to numerous reforms, including passage of the Foreign Intelligence Surveillance Act in 1978. The law created a special secret court tasked with approving electronic wiretaps in espionage and other national security investigations. After the Aldrich Ames spy case, Congress amended FISA to include approval of physical searches. After 9/11, the law was further amended to allow investi-

cording to several government officials. Mueller, backed by Comey, resisted the administration's efforts. "The White House was putting pressure on Mueller to broadly make cases with the intelligence," says one official. "But he did not want to use it as a basis for any affidavit in any court." Comey declined numerous requests for comment. Sources say Mueller and his general counsel, Valerie Caproni, continue to remain troubled by the domestic spying program. Martin, who has handled more intelligence-oriented criminal cases than anyone else at the Justice Department, puts the issue in stark terms: "The failure to allow it [information obtained from warrantless surveillance] to be used in court is a concession that it is an illegal surveillance."

Mueller has been criticized by some agents for being too close to the White House. His predecessor, Louis Freeh, made his break publicly from President Clinton, even returning his White House security access badge. Until recently, Mueller reported to the White House daily to brief Bush and Cheney. But Mueller has not shied away from making tough decisions. He refused to allow FBI agents to participate in CIA and Defense Department interviews of high-value prisoners because of the administration's use of aggressive interrogation techniques. In Iraq and at the Pentagon-run camp for terrorism suspects at Guantánamo Bay, Cuba, it has been FBI agents who have called attention to what they viewed as abuse of detainees.

It is unclear how much resistance from the FBI the White House and the Justice Department will be willing to brook. What is clear, however, is the extraordinary extent to which officials in both places inject themselves in the bureau's operations. In late 2004, President Bush asked then FBI Deputy Director Bruce Gebhardt, filling in for Mueller during the daily White House briefings, minute details about a suspected terrorism threat in Kansas. "Don't worry, Mr. President," responded Gebhardt, straight-faced. "We have Kansas surrounded." ●

White House and Justice Department lawyers pushed for more-aggressive tactics, but FBI officials demurred.

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After CIA spy Aldrich Ames was arrested, the law on surveillance got tougher.

gators to place wiretaps or conduct physical searches without notifying the court for 72 hours and to obtain "roving" wiretaps to allow investigators to tap multiple cellphones.

In justifying the NSA's warrantless surveillance program, Gonzales has argued that the review process required for a FISA warrant is too cumbersome for a program that is of "a military nature" and that requires "maximum speed and agility to achieve early warning."

White House lawyers, in particular, Vice President Cheney's counsel David Addington (who is now Cheney's chief of staff), pressed Mueller to use information from the NSA program in court cases, without disclosing the origin of the information, and told Mueller to be prepared to drop prosecutions if judges demanded to know the sourcing, ac-