

# HOLDER REFUSES TO STAND BY STATEMENTS SAYING VIOLATING FISA BREAKS THE LAW

By far the most disturbing part of the Senate Judiciary Committee oversight hearing today came when Russ Feingold asked Eric Holder whether he stands by a statement he made before the American Constitution Society last year.

In the midst of a speech that repeated "rule of law" like a Greek Chorus, after introducing this passage from his speech by saying certain steps taken by the Bush Administration "were unlawful," Holder said, "I never thought a President would act in direct defiance of federal law by authorizing warrantless NSA surveillance of American citizens."

When Feingold asked Holder whether he stands by that statement, Holder ignored the early part of his speech where he described all of Bush's abuses to be "unlawful," and instead tried to claim he was narrowly saying that Bush simply "contravened" FISA.

FEINGOLD: On another topic, I wrote to the president on Monday about my continued concern that the administration has not formally withdrawn certain legal opinions, including the January 2006 white paper that provided the justification for the Bush administration's warrantless wiretapping program. At the letter was prompted in part by a recent speech that I'm sure you're aware of by the director of national intelligence in which he asserted that the program was not illegal, but he later clarified that.

In a speech to the American Constitutional Society in June 2008,

you, sir, set the following. "I never thought that I would see the day when a president would act in direct defiance of federal law by authorizing warrantless NSA surveillance of American citizens."

And the president himself also several times as a senator and during the campaign said the program was illegal. Now that you are the attorney general, is there any doubt in your mind that the warrantless wiretapping program was illegal?

HOLDER: Well, I think that the warrantless wiretapping program as it existed at that point was certainly unwise in that it was put together without the approval of Congress and as a result did not have all the protections, all the strength that it might have had behind it, as – as I think it now exists with regard to having had congressional approval of it. So I think that the concerns that I expressed in that speech no longer exist because of the action that Congress has taken in regard...

FEINGOLD: But I asked you, Mr. Attorney General, not whether it was unwise, but whether you consider it to be an illegal, because that's certainly the implication of what you said in the quote I read and the explicit statement of the man who is now president of the United States.

HOLDER: Yes, well what I was saying in that speech was that I thought the action that the administration had taken was inconsistent with the dictates of – of FISA, and I think I used the word "contravention," and as a result I thought that the policy was an unwise one. And I think that the concerns that I expressed then have really been

remedied by the fact that Congress has now authorized the program.

FEINGOLD: But did you think it was illegal?

HOLDER: Well, I thought that, as I said, it was inconsistent with – with the FISA statute and unwise as a matter of policy.

FEINGOLD: Has something happened that's changed your opinion since your June 2008 statement that would make it hard for you to just simply say what the president said, that it's illegal?

HOLDER: No, I don't think so. And I don't think what I'm saying now is necessarily inconsistent with what I said at the – at the ACS convention or speech that I gave.

FEINGOLD: Well, it sounds awfully mild compared to some very clear statements and a very important principle here, which is not only that this has to do with the scope of the FISA law, but the underlying constitutional issue that people like mean and many people believe that is his statute is – is that explicit under the third test, under Justice Jackson's test, that it is in fact unconstitutional for the president and illegal, of course, for the president to override the expressed will of – of the Congress.

HOLDER: Yes. Well, as I said, I think I said "contravention of," "inconsistent with." I'm not sure I'd use the term "illegal," and I would adhere to – I'd adhere to what I said then. I think what I'm saying now is consistent with what I said in the – in the speech.

FEINGOLD: Well, that may well be, but I would hope that you would use the word "illegal" now, then. And I request in a

letter I sent to the president on Monday and also in a letter dated April 29th, that the administration withdraw the January 2006 white paper and other classified OLC memos providing legal justification of the program. I know you have initiated a review of the Bush era OLC memos. And, of course, certain memos that authorize torture have been withdrawn. Apparently, you discussed this a bit already today with Senator Feinstein. What is – what is the status of your review of the memos concerning the warrantless wiretapping program?

HOLDER: Well, I asked the Office of Legal Counsel to review these prior opinions, including those that deal with surveillance, with the goal of making as many of these opinions public as we can, consistent with our national security interests and also consistent with ensuring that robust debate can happen within the executive branch. It is my hope that that process, which is ongoing, will lead to the release of several opinions in a relatively short period of time.

FEINGOLD: I just want to reiterate how important it is for the legal justification for this program to be withdrawn concerning these memos that make unsupportable claims of executive power that will come back to haunt us if they remain in effect. And if you believe, as I – I think the president has indicated in the past, that the program was illegal, they – they cannot stand.

Watch Holder squirm as he tries to suggest that the President could violate FISA and yet not break the law.

Now, Feingold asks this question to support his insistence that the opinions authorizing the

warrantless wiretap program must be withdrawn. But I suspect Holder squirmed so wildly as much because of the cases before Vaughn Walker as he did because they're still relying on those opinions to authorize domestic surveillance. After all, if Holder admitted that violating FISA was tantamount to breaking the law, then it would simplify Judge Walker's task significantly. If the Attorney General admits that the former President violated FISA, then it makes it a lot easier for Walker to rule that he did.

But instead Holder squirmed and equivocated.

It's bad enough that Holder's trying to weasel out of statements he made a year ago. But I just saw the Attorney General all but suggest that contravening a law does not constitute breaking it.

Update: Here's Feingold's statement from after the hearing:

I was disappointed by Attorney General Holder's unwillingness to repeat what both he and President Obama had stated in the past – that President Bush's warrantless wiretapping program was illegal. For an administration that has repeatedly stated its intention to restore the rule of law, this episode was a step backward. While the Attorney General restated his belief that the program was inconsistent with the FISA statute, his testimony today, and the administration's delay in withdrawing the Bush Administration's legal justifications for the program, are troubling.