

# **“ONLY FACTS MATTER:” JIM COMEY IS NOT THE MASTER BUREAUCRAT OF INTEGRITY HIS PR SELLS HIM AS**

Since Jim Comey’s showy press conference yesterday, the press has rehashed Jim Comey’s carefully cultivated image as a Boy Scout, with outlet after outlet replaying the story of how he ran up some hospital steps once.

Sadly, even DOJ beat journalists seem unable to point out that that image has been carefully cultivated over years. Comey is a PR master.

But as I have written on several occasions, the story is more complicated. That’s true, first of all, because the 2004 hospital confrontation, in which Comey and a bunch of other DOJ officials threatened to quit and therefore allegedly shut down some illegal wiretap programs, did not end in March 2004. On the contrary, for the main unlawful program we know about – the Internet dragnet – that confrontation ended in July 2004 when, after some serious arm-twisting, DOJ got FISC presiding judge Colleen Kollar-Kotelly to authorize substantially the same Internet dragnet they refused to authorize themselves.

The arguments they used to pull that off are fairly breath-taking.

## **The hospital confrontation only served to hide illegal surveillance under a new rock**

First, they told Kollar-Kotelly she had to reauthorize the dragnet because terrorists wanted to plan an election year plot; as I note below, that claim was largely based on a fabrication.

Then, they argued that the standard for approval of a bulk Pen Register/Trap and Trace order was the same (arguably lower) as any other PRTT order focused on an individual. Kollar-Kotelly, DOJ argued, had no discretion over whether or how to approve this.

DOJ told Kollar-Kotelly she had no authority to do anything but approve their expansive plan to collect Internet data from telecom switches. “[T]he Court ‘shall’ authorize a pen register ... if an application brought before it complies with the requirements of the statute.” Even though, by collecting Internet metadata in bulk, the government would take away FISC’s authority to review whether the targets were agents of a foreign power, DOJ argued she had no authority to determine whether this bulk data – which she deemed an “enormous” amount – was “relevant” to the FBI’s investigations into terrorism.

And that meaning – which the government expanded even further in 2006 to claim the phone records of every single American were “relevant” to the FBI’s standing terrorism investigations – “requires no stretching of the ordinary meaning of the terms of the statute at all,” they claimed, in apparent seriousness.

DOJ further argued that’s the way the FISA court – which Congress created in 1978 to provide real judicial review while permitting the executive to keep its foreign spying secret – is supposed to work. Having FISC rubber-stamp the program they themselves had refused to authorize “promotes both of the twin goals of FISA,” DOJ argued, “facilitating the foreign-intelligence collection needed to protect American lives while at the same time providing judicial oversight to

■ safeguard American freedoms.”

Their claim this involved oversight is especially rich given that DOJ and FISC argued then – and continued to argue at least through 2010 when John Bates would reauthorize and expand this dragnet – that the FISC had no authority to impose minimization procedures for bulk collected data, which has historically been the sole way FISC exercises any oversight. Then, during the period of the very first dragnet order, NSA “discovered” it was violating standards Kollar-Kotelly imposed on the collection (effectively, violating the minimization procedures). But in spite of the fact that she then imposed more requirements, including twice quarterly spot checks on the collection, those violations continued unabated until NSA’s Inspector General finally started, on Reggie Walton’s order, an (aborted) real review of the collection in 2009. At that point, OGC all of a sudden “discovered” that their twice-quarterly spot checks had failed to notice that *every single record* NSA had collected during that 5 year period had violated FISC standards.

In short, the program was never, ever, in legal compliance. That was the solution Comey achieved to the unlawful program he got shut down.

DOJ’s – Jim Comey’s – efforts to undercut FISC not only led to other really problematic FISC decisions based on this precedent (including, but not limited to, the phone dragnet in 2006 and upstream collection in 2007), but also gave illegal collection the patina of legality solely by making someone else authorize a program she couldn’t oversee.

**DOJ deliberately bypassed Congress because they knew it wouldn’t approve the**

# surveillance

Along with radically changing the nature of FISC in the wake of the hospital confrontation, DOJ – Jim Comey – affirmatively bypassed Congress because they didn't want to tell America it was spying on them in bulk.

DOJ pointed to language showing Congress intended pen registers to apply to the Internet; they pointed to the absence of language prohibiting a pen register from being used to collect data from more than a single user, as if that's the same as collecting from masses of people and as if that proved congressional intent to wiretap everyone.

And then they dismissed any potential constitutional conflict involved in such broad rereadings of statutes passed by Congress. "In almost all cases of potential constitutional conflict, if a statute is construed to restrict the executive, the executive has the option of seeking additional clarifying legislation from Congress," the heroes of the hospital confrontation admitted. The White House had, in fact, consulted Majority Leader Tom DeLay about doing just that, but he warned it would be too difficult to get new legislation. So two months later, DOJ argued Congress' prerogative as an independent branch of government would just have to give way to secrecy. "In this case, by contrast, the Government cannot pursue that route because seeking legislation would inevitably compromise the secrecy of the collection program the Government wishes to undertake."

This was a pretty big assault on separation of powers, and not one justified by the efficacy of the program or the needs of the collection.

While I won't go into it here, this is all about the best known part of the Stellar Wind program that was not so much "shut down" as "dumped into someone else's legal lap." There's another aspect of Stellar Wind – one I don't yet fully understand – that Comey reauthorized on his own, one that has gotten no reporting. I hope to return to this.

## **Comey's DOJ lets itself be manhandled into reauthorizing torture and surveillance**

There's an intimately related effort Comey gets some credit for which in fact led to fairly horrible conclusions: torture. Jack Goldsmith, with Comey's backing, also withdrew the shoddy John Yoo memo authorizing waterboarding and other torture (Goldsmith also prevented Yoo from retroactively authorizing more techniques).

But on July 2, 2004 – two weeks before Goldsmith left – the intelligence community found another detainee it just had to torture, Janat Gul, based on already questioned claims he wanted to plan an election year attack. They had a Principal's Committee meeting to discuss what to do. After Jim Comey and John Bellinger left the meeting, the PC agreed to engage in torture again (though not waterboarding). Five days later Goldsmith wrote to ensure the IC knew this meant they had to follow the guidelines laid out under the original Yoo memo. By September, after Gul and some associates had been tortured extensively – each time with Dan Levin writing what I'm sure he imagined to be a soundly reviewed approval for the torture – Levin had approved waterboarding again, along with the techniques Goldsmith had prevented Yoo from retroactively and unilaterally authorizing. OLC repeatedly promised a more fulsome memo laying out the approval offered, ostensibly in reaction to an immediate need, in 2004. Jim Comey initiated that process in fall and December 2004. But in

the end, the technique memos completed by Steven Bradbury in May 2005 authorized both waterboarding, as well as all the other conditions (primarily techniques use in combination) Comey seems to have tried to have set to make them impossible to use again. Comey resigned right before these memos were finalized, so it's possible he made another – failed – attempt to prevent the illegal program by threatening to quit; he did, however, stick around for another three months before he moved onto his sinecures at Lockheed and Bridgewater.

Here's the tragic thing about this unsuccessful effort to impose order on the torture program: it, like the Iraq War itself, was based on a fabricator.

CIA came to Comey and others, said, "this guy wants to attack the presidential elections so we need a dragnet and torture," to which DOJ said okay.

The CIA in March 2004 received reporting from a source the torture report calls "Asset Y," who said a known Al-Qaeda associate in Pakistan, Janat Gul – whom CIA at the time believed was a key facilitator – had set up a meeting between Asset Y and Al-Qaeda's finance chief, and was helping plan attacks inside the United States timed to coincide with the November 2004 elections. According to the report, CIA officers immediately expressed doubts about the veracity of the information they'd been given by Asset Y. A senior CIA officer called the report "vague" and "worthless in terms of actionable intelligence." He noted that Al Qaeda had already issued a statement "emphasizing a lack of desire to strike before the U.S. election" and suggested that since Al-Qaeda was aware that "threat reporting causes panic in Washington" and inevitably results in

leaks, planting a false claim of an election season attack would be a good way for the network to test whether Asset Y was working for its enemies. Another officer, assigned to the group hunting Osama bin Laden, also expressed doubts.

[snip]

Nevertheless, the CIA took seriously Asset Y's claim that Gul was involved in an election plot and moved quickly to gain custody of him after his arrest by Pakistan in June 2004. Even before CIA rendered Gul to its custody, Tenet started lobbying to get torture techniques reapproved for his interrogation.

On June 29, Tenet wrote National Security Adviser Condoleezza Rice seeking approval to once again use some of the techniques whose use he suspended less than four weeks earlier, in the hope of gathering information on the election season plot. "Given the magnitude of the danger posed by the pre-election plot and Gul's almost certain knowledge of any intelligence about that plot" Tenet wrote, relying on Asset Y's claims, "I request the fastest possible resolution of the above issues."

[snip]

Soon after the reauthorization of the torture and the Internet dragnet, the CIA realized ASSET Y's story wasn't true. By September, an officer involved in Janat Gul's interrogation observed, "we lack credible information that ties him to pre-election threat information or direct operational planning against the United States, at home or abroad." In October, CIA reassessed ASSET Y, and found him to be deceptive.

When pressured, ASSET Y admitted had had made up the story of a meeting set up by Gul. ASSET Y blamed his CIA handler for pressuring him for intelligence, leading him to lie about the meeting.

By 2005, CIA had concluded that ASSET Y was a fabricator, and Janat Gul was a “rather poorly educated village man [who is] quite lazy [who] was looking to make some easy money for little work and he was easily persuaded to move people and run errands for folks on our target list” (though the Agency wasn’t always forthright about the judgment to DOJ).

During Comey’s entire effort – to put order to the dragnet, to put order to the torture – he was in fact being led by the nose by the CIA, once again using the report of a fabricator to authorize actions the US had no business engaging in.

If that were all, I’d consider this a tragic story: poor Jim Comey trying to ensure the US does good, only to be undermined by the dishonest folks at the CIA, using asymmetric information again to ensure their ass gets covered legally.

## **Jim Comey refuses to review what he did in 2004 and 2005**

But here’s the part that, in my opinion, makes being snookered by the CIA unforgivable. Thus far, Comey has refused to read the full Torture Report to learn how badly he got snookered, even though he promised Dianne Feinstein to do so in his confirmation process.

I am specifically intrigued by Comey’s apparent lack of curiosity about the full report because of his actions in 2005.

As these posts lay out (one, two), Comey



was involved in the drafting of 2 new OLC memos in May 2005 (though he may have been ignorant about the third). The lies CIA told OLC in 2004 and then told OLC again in 2005 covering the same torture were among the worst, according to Mark Udall. Comey even tried to hold up the memo long enough to do fact gathering that would allow them to tie the Combined memo more closely to the detainee whose treatment the memo was apparently supposed to retroactively reauthorize. But Alberto Gonzales' Chief of Staff Ted Ulyot told him that would not be possible.

Pat [Philbin] explained to me (as he had to [Steven Bradbury and Ted Ulyot]) that we couldn't make the change I thought necessary by Friday [April 29]. I told him to go back to them and reiterate that fact and the fact that I would oppose any opinion that was not significantly reshaped (which would involve fact gathering that we could not complete by Friday).

[snip]

[Ulyot] mentioned at one point that OLC didn't feel like it would accede to my request to make the opinion focused on one person because they don't give retrospective advice. I said I understood that, but that the treatment of that person had been the subject of oral advice, which OLC would simply be confirming in writing, something they do quite often.

At the end, he said that he just wanted me to know that it appeared the second opinion

would go [Friday] and that he wanted to make sure I knew that and wanted to confirm that I felt I had been heard.

Presuming that memo really was meant to codify the oral authorization DOJ had given CIA (which might pertain to Hassan Ghul or another detainee tortured in 2004), then further details of the detainee's torture would be available in the full report. Wouldn't Comey be interested in those details now?

But then, so would details of Janat Gul's torture, whose torture was retroactively authorized in an OLC memo Comey himself bought off on. Maybe Comey has good reason not to want to know what else is in the report.

Sure, he may be doing so to prevent Jason Leopold from liberating the report via FOIA. But in doing so, he is also refusing to examine his own actions, his own willingness to reauthorize the dragnet and torture he had just shut down in the service of a lie. He is refusing to consider whether the deals he made with the devil in 2004 were unsound.

Even here, I might just consider this a tragic story, of a morally just man bested by bureaucratic forces both more sinister and dishonest than Comey.

Except for Comey's Manichean view of the world.

His world is separated into the Good Guys who should have access to encryption and the Bad Guys who should not, the loyal people like Hillary who can be "extremely careless in their handling of very sensitive, highly classified information" with no legal consequences and the disloyal people like Thomas Drake who get prosecuted for doing the very same things.

That's not the world where self-proclaimed Boy

Scout Jim Comey assents to the reauthorization of torture and dragnets based on a fabrication with no repercussions or even soul-searching.

I mean, I get it. There is no place for Boy Scouts in the top ranks of our national security state. I get that you're going to lose bureaucratic fights to really immoral causes and manipulative spooks. I get you're sometimes going to get the so-called trade-off between liberty and security wrong, especially when you get lied to.

But given that reality, there is no place for pretend Boy Scouts. There is no place to pretend your world is as easy as running up some hospital steps, victory!, we've vanquished presidential abuses so let's go dismantle separation of powers! That's just naive, but in the service of the FBI Director, it legitimizes a really unjust – morally-rather-than-legally-based – method of policing.

Comey seems to believe his self-created myth at this point, and that's a very dangerous spot for a guy deigning to be the investigator and prosecutor of who is loyal and who disloyal.

Update: Matthew Miller wrote up his criticism of Comey's abuse of power here.

Update: Here's an interview I did for Pacifica on the email question generally.