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Conflict Over Spying Led White House to Brink

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This is the first of two stories adapted from "Angler: The Cheney Vice Presidency," to be published Tuesday by [Penguin Press](#). Original source notes are denoted in [\[brackets\]](#) throughout.

A burst of ferocity stunned the room into silence. No other word for it: The vice president's attorney was shouting.

"The president doesn't want this! [\[1\]](#) You are not going to see the opinions. You are out . . . of . . . your . . . lane!"

Five government lawyers had gathered around a small conference table in the [Justice Department](#) command center. Four were expected. [David S. Addington](#), counsel to [Vice President Cheney](#), got wind of the meeting and invited himself.

If Addington smelled revolt, he was not far wrong. Unwelcome questions about warrantless domestic surveillance had begun to find their voice.

Cheney and his counsel would struggle for months to quash the legal insurgency. By the time [President Bush](#) became aware of it, his No. 2 had stoked dissent into flat-out rebellion. The president would face a dilemma, and the presidency itself a historic test. Cheney would come close to leading them off a cliff, man and office both [\[2\]](#).

On this second Monday in December 2003, Addington's targets were a pair of would-be auditors from the [National Security Agency](#). He had displeasure to spare for their Justice Department hosts.

Perfect example, right here. A couple of NSA bureaucrats breeze in and ask for the most sensitive documents in the building. And Justice wants to tell them, *Help yourselves?* This was going to be a very short meeting.

Joel Brenner and Vito Potenza, the two men wilting under Addington's wrath, had driven 26 miles from [Fort Meade](#), the NSA's eavesdropping headquarters in Maryland. They were conducting a review of their agency's two-year-old special surveillance operation. They already knew the really secret stuff [\[3\]](#): The NSA and other services had been unleashed to turn their machinery inward, collecting signals intelligence inside the United States. What the two men didn't know was why the Bush administration believed the program was legal.

It was an awkward question. Potenza, the NSA's acting general counsel, and Brenner, its inspector general, were supposed to be the ones who kept their agency on the straight and narrow. That's what Cheney and their boss, Lt. Gen. Michael V. Hayden, told doubters among the very few people who

knew what was going on. Cheney, who chaired briefings for select members of Congress, said repeatedly that the NSA's top law and ethics officers -- career public servants -- approved and supervised the surveillance program.

That was not exactly true, not without one of those silent asterisks that secretly flip a sentence on its tail. Every 45 days, after Justice Department review, Bush renewed his military order for warrantless eavesdropping. Brenner and Potenza told Hayden that the agency was entitled to rely on those orders [4]. The United States was at war with [al-Qaeda](#), intelligence-gathering is inherent in war, and the Constitution appoints the president commander in chief.

But they had not been asked to give their own written assessments of the legality of domestic espionage. They based their answer in part on the attorney general's certification of the "form and legality" of the president's orders. Yet neither man had been allowed to see the program's codeword-classified legal analyses [5], which were prepared by John C. Yoo, Addington's close ally in the [Justice Department's Office of Legal Counsel](#). Now they wanted to read Yoo's opinions for themselves [6].

"This is none of your business!" Addington exploded.

He was massive in his swivel chair, taut and still, potential energy amping up the menace. Addington's pugnacity was not an act. Nothing mattered more, as the vice president and his lawyer saw the world, than these new surveillance tools. Bush had made a decision. Debate could only blow the secret, slow down vital work, or call the president's constitutional prerogatives into question.

The NSA lawyers returned to their car empty-handed.

* * *

The command center of "the president's program," as Addington usually called it, was not in the [White House](#). Its controlling documents, which gave strategic direction to the nation's largest spy agency, lived in a vault across an alley from the West Wing [7] -- in the Eisenhower Executive Office Building, on the east side of the second floor, where the vice president headquartered his staff.

The vault was in EEOB 268, Addington's office. Cheney's lawyer held the documents, physical and electronic, because he was the one who wrote them. New forms of domestic espionage were created and developed over time in presidential authorizations that Addington typed on a Tempest-shielded computer across from his desk [8].

It is unlikely that the history of U.S. intelligence includes another operation conceived and supervised by the office of the vice president. White House Chief of Staff Andrew H. Card Jr. had "no idea," he said, that the presidential orders were held in a vice presidential safe. An authoritative source said the staff secretariat, which kept a comprehensive inventory of presidential papers, classified and unclassified, possessed no record of these.

In an interview, Card said the Executive Office of the President, a formal term that encompassed Bush's staff but not Cheney's, followed strict procedures for handling and securing presidential papers.

"If there were exceptions to that, I'm not aware of them," he said. "If these documents weren't stored the right way or put in the right places or maintained by the right people, I'm not aware of it."

Asked why Addington would write presidential directives, Card said, "David Addington is a very competent lawyer." After a moment he added, "I would consider him a drafter, not *the* drafter [9]. I'm sure there were a lot of smart people who were involved in helping to look at the language and the law."

Not many, it turned out. Though the president had the formal say over who was "read in" to the domestic surveillance program, Addington controlled the list in practice, according to three officials with personal knowledge. White House counsel [Alberto R. Gonzales](#) was aware of the program, but was not a careful student of the complex legal questions it raised. In its first 18 months, the only other lawyer who reviewed the program was [John Yoo](#).

By the time the NSA auditors came calling, a new man, [Jack L. Goldsmith](#), was chief of the Justice Department's Office of Legal Counsel. Soon after he arrived on Oct. 6, 2003, the vice president's lawyer invited him to EEOB 268. Addington pulled out a folder with classification markings that Goldsmith had never seen [10].

"David Addington was doing all the legal work. All the important documents were kept in his safe [11]," Goldsmith recalled. "He was the one who first briefed me."

Goldsmith's new assignment gave him final word in the executive branch on what was legal and what was not. Addington had cleared him for the post -- "the biggest presence in the room," Goldsmith said, during a job interview ostensibly run by Gonzales.

Goldsmith did not have the looks of a guy who posed a threat to the Bush administration's alpha lawyer. A mild-mannered law professor from the [University of Chicago](#), he was ruffled and self-conscious, easy to underestimate. On first impression, he gave off a misleading aura of softness. Goldsmith had lettered in football, baseball and soccer at the Pine Crest School in Fort Lauderdale, Fla., [12] spending his formative years with a mob-connected Teamster who married his mother [13]. He was not a bare-knuckled brawler in Addington's mold, but Goldsmith arrived at Justice with no less confidence and strength of will.

Addington's behavior with the NSA auditors was "a wake-up call for me," Goldsmith said. Cheney and Addington, he came to believe, were gaming the system, using secrecy and intimidation to prevent potential dissenters from conducting an independent review.

"They were geniuses at this," Goldsmith said. "They could divide up all these problems in the bureaucracy, ask different people to decide things in their lanes, control the facts they gave them, and then put the answers together to get the result they want."

Dec. 9, 2003, the day of the visit from Brenner and Potenza, was the beginning of the end of that strategy. The years of easy victory were winding down for Cheney and his staff.

* * *

Goldsmith began a top-to-bottom review of the domestic surveillance program, taking up the work begun by a lawyer named Patrick F. Philbin after John Yoo left the department. Like Yoo and Goldsmith, Philbin had walked the stations of the conservative legal establishment: [Federalist Society](#), a clerkship with U.S. Circuit Judge Laurence H. Silberman, another with Supreme Court Justice [Clarence Thomas](#).

The more questions they asked, the less Goldsmith and Philbin liked the answers. Parts of the program fell easily within the constitutional powers of the commander in chief. Others looked dicier.

The two lawyers worked at the intersection of three complex systems: telecommunications, spy technology, and the statutory regimes that governed surveillance. After a few weeks, Goldsmith said, he decided the program "was the biggest legal mess I'd seen in my life."

He asked for permission to read in [Attorney General John D. Ashcroft's](#) new deputy, [James B. Comey](#) [14]. As always, he found Addington waiting with Gonzales in the White House counsel's corner office, one floor up from the chief of staff. They sat in parallel wing chairs, much as Bush and Cheney did in the Oval Office.

"The attorney general and I think the deputy attorney general should be read in," Goldsmith said.

Addington replied first.

"Forget it," he said.

"The president insists on strict limitations on access to the program," Gonzales agreed.

Weeks passed. Goldsmith kept asking. Addington kept saying no.

"He always invoked the president, not the vice president," Goldsmith said [15].

Comey was not exactly Mr. Popular at 1600 Pennsylvania Ave. He had arrived at Justice as a 6-foot-8 golden boy, smooth and polished, with top chops as a federal terrorism prosecutor in Northern Virginia and New York City. Then came Dec. 30, 2003. Comey did something unforgivable: He appointed an independent counsel to investigate the leak of [Valerie Plame's](#) identity as a clandestine [CIA](#) officer, a move that would bring no end of grief for Cheney.

In late January, Goldsmith and Addington cut a deal. Comey would get his read-in. Goldsmith would get off the fence about the program, giving his definitive answer by the March 11 deadline.

"You're the head of the Office of Legal Counsel, and if you say we cannot do this thing legally, we'll shut it off," Addington told him [16].

Feel free to tell the president that his most important intelligence operation has to stop.

Your call, Jack.

Goldsmith wanted to fix the thing, not stop it. He and Philbin traveled again and again to Fort Meade, each time delving deeper. They were in and out of Gonzales's office, looking for adjustments in the

program that would bring it into compliance with the law. The issues were complex and remain classified. Addington bent on nothing, swatting back every idea. Gonzales listened placidly, sipping Diet Cokes from his little refrigerator, encouraging the antagonists to keep things civil.

There would be no easy out, no middle ground. Addington made clear that he did not believe for a moment that Justice would pull the plug.

* * *

Mike Hayden and Vito Potenza drove down from NSA headquarters after lunch on Feb. 19, 2004, to give Jim Comey his first briefing on the program. In the Justice Department's vault-like SCIF, a sensitive compartmented information facility, Hayden got Comey's attention fast.

"I'm so glad you're getting read in, because now I won't be alone at the table when [John Kerry](#) is elected president," the NSA director said [17].

The witness table, Hayden meant. Congressional hearing, investigation of some kind. Nothing good. Kerry had the Democratic nomination just about locked up and was leading Bush in national polls. Hardly anyone in the intelligence field believed the next administration would climb as far out on a legal limb as this one had.

"Hayden was all dog-and-pony, and this is probably what happened to those poor folks in Congress, too," Comey told his chief of staff after the briefing. "You think for a second, 'Wow, that's great,' and then if you try actually to explain it back to yourself, you don't get it. You scratch your head afterward and you think, 'What the hell did that guy just tell me?' "

The NSA chief insisted on limiting surveillance to e-mails, phone calls and faxes in which one party was overseas, deflecting arguments from Cheney and Addington that he could just as well collect communications inside the United States.

That was one reason Hayden hated when reporters referred to "domestic surveillance." He made his point with a folksy analogy: He had taken "literally hundreds of domestic flights," he said, and never "landed in Waziristan." That sounded good. But the surveillance statutes said a warrant was required if *either* end of the conversation was in U.S. territory. The American side of the program -- the domestic surveillance -- was its distinguishing feature.

By the end of February, Goldsmith and Philbin had reached their conclusion: Parts of the surveillance operation had no support in law. Comey was so disturbed that he drove to Langley one evening to compare notes with Scott W. Muller, the general counsel at the CIA. Muller "got it immediately," agreeing with the Goldsmith-Philbin analysis, Comey said.

"At the end of the day, I concluded something I didn't ever think I would conclude, and that is that Pat Philbin and Jack Goldsmith understood this activity much better than [Michael Hayden](#) did," he said.

On Thursday, March 4, Comey brought the findings to Ashcroft, conferring for an hour one-on-one. Three senior Justice Department officials said in interviews that Ashcroft gave his full backing. He was not going to sign the next presidential order -- due in one week, March 11 -- unless the White

House agreed to a list of required changes.

* * *

A few hours later, Ashcroft was reviewing notes for a news conference in Alexandria when his color changed and he sat down heavily. An aide, [Mark Corallo](#), ducked out and returned to find the attorney general laid out on his back. By nightfall, Ashcroft was taken to George Washington University Medical Center in severe pain, suffering acute gallstone pancreatitis. Comey became acting attorney general on Friday.

The next day -- Saturday, March 6, five days before the March 11 deadline -- Goldsmith brought the Justice Department verdict to the White House. He told Gonzales and Addington for the first time that Justice would not certify the program.

A long silence fell. It lasted three full days.

Gonzales phoned Goldsmith at home before sunrise on Tuesday, March 9, with two days left before the program expired. Obviously there was bad chemistry with Addington. Why not come in and talk, he asked, just the two of us?

Goldsmith arrived at the White House in morning twilight. Alone in his office, Gonzales begged the OLC chief to reconsider. Gonzales tried to dispute Goldsmith's analysis, but he was in over his head. At least let us have more time, he said. Goldsmith said he couldn't do that.

The time had come for the vice president to step in. Proxies were not getting the job done. Cheney was going to have to take hold of this thing himself.

Even now, after months of debate, Cheney did not enlist the president. Bush was across the river in Arlington, commending the winners of the Malcolm Baldrige awards for quality improvement in private industry [18]. Campaign season had come already, and the president was doing a lot of that kind of thing. That week he had a fundraiser in Dallas, a "Bush-Cheney 2004 event" in Santa Clara, Calif., and a meet-and-greet at a rodeo in Houston.

Soon after hearing what had happened between Goldsmith and Gonzales, the vice president asked [Andy Card](#) to set up a meeting at noon with Mike Hayden, [FBI Director Robert S. Mueller III](#), and [John McLaughlin](#) from the CIA (substituting for his boss, [George J. Tenet](#)). Cheney spoke to them in Card's office, the door closed.

Four hours later, at 4 p.m., the same cast reconvened. This time the Justice contingent was invited. Comey, Goldsmith and Philbin found the titans of the intelligence establishment lined up, a bunch of grave-faced analysts behind them for added mass. The spy chiefs brought no lawyers. The law was not the point. This meeting, described by officials with access to two sets of contemporaneous notes, was about telling Justice to set its qualms aside.

The staging had been arranged for maximum impact. Cheney sat at the head of Card's rectangular table, pivoting left to face the acting attorney general. The two men were close enough to touch. Card sat grimly at Cheney's right, directly across from Comey. There was plenty of eye contact all around.

This program, Cheney said, was vital. Turning it off would leave us blind. Hayden, the NSA chief, pitched in: Even if the program had yet to produce blockbuster results, it was the only real hope of discovering sleeper agents before they could act.

"How can you possibly be reversing course on something of this importance after all this time?" Cheney asked [19].

Comey held his ground. The program had to operate within the law. The Justice Department knew a lot more now than it had before, and Ashcroft and Comey had reached this decision together.

"I will accept for purposes of discussion that it is as valuable as you say it is," Comey said. "That only makes this more painful. It doesn't change the analysis. If I can't find a lawful basis for something, your telling me you really, really need to do it doesn't help me."

"Others see it differently," Cheney said.

There was only one of those, really. John Yoo had been out of the picture for nearly a year. It was all Addington.

"The analysis is flawed, in fact facially flawed," Comey said. "No lawyer reading that could reasonably rely on it."

Gonzales said nothing. Addington stood by the window, over Cheney's shoulder. He had heard a bellyful.

"Well, I'm a lawyer and I did," Addington said, glaring at Comey.

"No good lawyer," Comey said [20].

In for a dime, in for a dollar.

Addington started disputing the particulars. Now he was on Jack Goldsmith's turf. From across the room the head of the Office of Legal Counsel jumped in. And right there in front of the big guys, the two of them bickered in the snarly tones of a couple who knew all of each other's lines.

* * *

As the sun went down on Tuesday, March 9, the president of the United States had yet to learn that his Justice Department was heading off the rails. A train wreck was coming, but Cheney wanted to handle it. Neither Card nor Gonzales was in the habit of telling him no.

"I don't think it would be appropriate for the president to be engaged in the to-and-fro until it is, you know, penultimate," Card said in a recent interview [21]. "I guess the definition of 'penultimate' could vary from four steps to three steps to two steps to one step. That's why you have White House counsel and people who do the legal work."

Participants in the afternoon meeting, including some of Cheney's recruits, left the room shaken. Mueller worked for the attorney general, and the [FBI](#)'s central mission was to "uphold and enforce the

criminal laws of the United States." Hayden's neck, and his agency, were on the line. The NSA director believed in the program, believed he was doing the right thing. But keep on going when the Justice Department said no?

Early the next morning -- Wednesday, March 10, with 24 hours to deadline -- Hayden was back in the White House. One colleague saw him conferring in worried whispers with Homeland Security adviser John A. Gordon, a mentor and fellow Air Force general, much the senior of the two. They huddled in the West Wing lobby, Hayden on a love seat and Gordon in a chair [22].

Jim Comey was in the White House that morning, too, arriving early for the president's regular 8:30 terrorism brief. He had heard nothing since the discouraging meeting the day before.

Comey found [Frances Fragos Townsend](#), an old friend, waiting just outside the Oval Office, standing by the appointment secretary's desk. She was Bush's deputy national security adviser for combating terrorism. Comey had known her since their days as New York mob prosecutors in the 1980s. Since then, Townsend had run the Justice Department's intelligence office. She lived and breathed surveillance law.

Comey took a chance. He pulled her back out to the hallway between the Roosevelt Room and the Cabinet Room.

"If I say a word, would you tell me whether you recognize it?" he asked quietly.

He did. She didn't. The program's classified code name left her blank. Comey tried to talk around the subject.

"I think this is something I am not a part of," Townsend said [23]. "I can't have this conversation." Like John Gordon and deputy national security adviser Steven J. Hadley and Homeland Security Secretary [Tom Ridge](#), she was out of the loop [24].

Oh, God, Comey remembers thinking. They've held this so tight. Even Fran Townsend. The president's counterterrorism adviser is not read in? Comey towered over his diminutive friend. He chose his words carefully.

"I need to know," he said, "whether your boss recognizes that word, and whether she's read in on a particular program. Because we had a meeting here yesterday on that topic that I would have expected her to be at."

He meant national security adviser [Condoleezza Rice](#). Comey was hoping for an ally, or maybe rescue.

"I felt very alone, with some justification," Comey recalled. "The attorney general is in intensive care. There's a train coming down the tracks that's about to run me and my career and the Department of Justice over. I was exploring every way to get off the tracks I could."

Townsend had a pretty good guess about what was on Comey's mind. Cheney had kept her out of the loop, but it was hard to hide a warrantless domestic surveillance program completely from the

president's chief terrorism adviser.

"I'm not the right person to talk to," she told her friend, her voice close to a whisper. Comey ought to go see Rice.

"I'm going to tell her you've got concerns," Townsend said.

Comey's concerns no longer interested Cheney. The vice president had tried to back him down. That didn't work.

Only one day remained before the surveillance program expired. Time for Cheney to take the fight somewhere else.

Staff researcher Julie Tate contributed to this report. Tomorrow: Bush's dilemma.

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