Growing Backlash to 'Coup On the Installment Plan'

by Edward Spannaus

In a significant institutional show of force against the unilateral, dictatorial actions of the Bush-Cheney Administration, four senior Federal judges, who have all served seven-year terms on the secret Foreign Intelligence Surveillance Act (FISA) Court, testified in front of the Senate Judiciary Committee on March 28. They appeared in support of the bill being proposed by Sen. Arlen Specter (R-Pa.), which would require the Administration to submit its domestic surveillance program to the FISA Court for review on its constitutionality.

While under normal circumstances, such a proposal as Specter's might seem unremarkable, the Bush-Cheney Administration shunned the FISA Court when it instituted its domestic spying program, despite the fact that the FISA law states explicitly that its procedures are the "exclusive" means by which electronic surveillance can be carried out within the United States. Thus, Specter's bill is strongly opposed by the Administration, which adheres to the Nazi-like position put forward since 9/11 by Dick Cheney and Cheney's legal counsel (now chief of staff) David Addington, that "we don't need no stinkin' courts"—or Congress either—to tell them what they can do or not do, in the so-called war on terrorism.

This Constitution-be-damned attitude has provoked a strong backlash among the institutions of government, reflected on many fronts—including in the growing number of anti-Administration moves by Senate Republicans, in the increasing willingness of military-linked officials to speak out, and especially in the judiciary branch, as shown in the unprecedented appearances by the FISA judges at the Senate Judiciary Committee, and likewise in the recent proceedings at the U.S. Supreme Court.

Intelligence: No Conflict With Constitution

The four former FISA Court judges designated as the their lead witness Federal Magistrate Judge Alan Kornblum, probably the most experienced official in the country with respect to FISA. Kornblum served in the Justice Department's Office of Intelligence Policy and Review, from 1979 to 2000. In contrast to the Administration's blatant disdain and disregard for the FISA law, Kornblum described the FISA statute as "the most successful foreign-intelligence program the United States has had since the code-breaking operations of World War II."

"I also want to emphasize," Kornblum said, "that the real success of the FISA statute, is that it's proven indisputably that intelligence and counterintelligence activities . . . are fully compatible with the rule of law"—again in stark contrast to the Cheney-Addington doctrine, modelled after the doctrine of Nazi "Crown Jurist" Carl Schmitt, that all the rules go out the window in the post-9/11 world.

The third point that Kornblum stressed, concerned the legal protections that FISA provides to intelligence agents, particular those in the FBI and National Security Agency (NSA) who are involved in clandestine intelligence activities—legal protections which are *not* afforded to those agents who are carrying out the Administration's unauthorized warrantless surveillance program.

With respect to the claims of inherent Presidential authority which are being cited as the basis for the surveillance program, Kornblum declared: "I'm very wary of 'inherent authority.' It sounds like King George."

A fifth former FISA Court judge, James Robertson, also weighed in, supporting Specter's proposal. Robertson resigned from the FISA Court last December in protest, within days of the disclosure of the NSA domestic spying program which had circumvented the FISA Court. Specter read from a letter submitted by Robertson, who had served in military intelligence before being appointed to the Federal bench. "Seeking judicial approval for government activities that implicate Constitutional protections is, of course, the American

way," Robertson wrote, adding that the FISA Court "is best situated to review the surveillance program. Its judges are independent, appropriately cleared, experienced in intelligence matters, and have a perfect security record."

The four FISA judges who testified represent many decades of experience in the Federal judiciary, with their initial appointments ranging from 1975 to 1983; all have reached retirement age and are now serving in senior status. All had been appointed to serve on the FISA Court by the late Chief Justice William Rehnquist, during the 1990s. One of them, Judge Stanley Brotman of New Jersey, served in the Office of Strategic Services (OSS) in World War II, and then, during the Korean War in the Armed Forces Security Agency, the 1949-52 predecessor to the NSA. Judge John F. Keenan of New York served also served in military intelligence in the 1950s, in the Army Security Agency, also a precursor agency to the NSA.

Judge William Stafford of Florida, a former Navy lieutenant, concluded his testimony in support of Specter's proposal, as follows:

"As I approach my 75th birthday, it remains my belief that our nation is really held together by a couple pieces of paper—the Declaration of Independence and the Constitution—and the belief of the American people that our system of government works.

"FISA was created by Congress to clarify that the President had the authority to conduct foreign-intelligence surveillance, but that the President would do so through a court composed of judges who had been nominated for lifetime appointments by a President, and confirmed by the Senate as provided in Article III of the Constitution. This arrangement seems to have worked well for everyone, and these amendments will, in my judgment, continue that arrangement into the real world of the 21st Century."

A Coup on the Installment Plan

Another hearing on the NSA program and the scope of Presidential power was held by the Judiciary Committee on March 31, on the topic of the resolution for censure of the President put forward by Sen. Russ Feingold (D-Wisc.). Although Specter said he regards Feingold's motion as having "no merit," he said he was holding the hearing because the resolution "provides a forum for the discussion of these issues which really ought to be considered in greater depth than they have been."

Given the opportunity to call witnesses of his choosing, Feingold selected two with Republican backgrounds: Watergate figure John Dean, and Reagan Administration Justice Department official Bruce Fein.

It was John Dean's first appearance before the Senate since his famous 1974 testimony; he said that he was not aware of any Presidency in history before this one, that had adopted a policy of expanding power for its own sake, but that this was the policy of the Bush/Cheney Presidency from the outset. Dean said that he hoped that the Congress "for institutional reasons, not partisan gamesmanship, will act on Senator Feingold's resolution."

Bruce Fein, who served in the Justice Department's Office of Legal Policy in the early years of the Reagan-Bush Administration, also urged the Senate to act against President G.W. Bush for the warrantless surveillance program.

Fein testified that "there are two features of the current crisis with President Bush's assertion of inherent constitutional authority that I think are unprecedented." First, that these are war-time powers for a war on terrorism that has no ending point, and that "therefore, the President's assertions of powers have to be taken as permanent changes on the political landscape of checks and balances." And the second relates to the scope of the battlefield—which is all the world.

"These are the kinds of extravagant claims, I suggest, that require a very close attention to the legal theories that have been advanced to justify the warrantless surveillance program in secret for over 4.5 years," Fein stated. "You can lose a republic on the installment plan every bit as efficiently as at one fell swoop with a coup d'état."

The Supreme Court Reacts

A third institutional reflex was evident during the Supreme Court arguments in the case of Guantanamo detainee Salim Hamdam, which also took place on March 28. A majority of the Justices appeared unwilling to accept the Administration's contention that Congress has stripped the courts of jurisdiction to hear habeas corpus petitions filed by prisoners at Guantanamo. Observers were particularly struck by the questioning by Justice Anthony Kennedy, who is the likely swing vote on the High Court, after the retirement of Justice Sandra Day O'Connor. Kennedy now holds the balance between the four hard-core Federalist Society followers (Antonin Scalia, Clarence Thomas, John Roberts, and Samuel Alito), and the more moderate Justices.

It seemed evident from the aggressive questioning of Solicitor General Paul Clement, that a majority of the Justices, including Kennedy, do not like being told that they have no power to consider something as fundamental to U.S. Constitutional law as the writ of habeas corpus.

Justice Scalia, who refused to recuse himself after publicly expressing his views on the case, was the Administration's strongest defender during oral arguments. Significantly, five retired generals and admirals, who had filed a brief in support of Hamdam, asked Scalia to recuse himself, after he had made public comments ridiculing the notion that detainees held and being tried by the U.S. military should have any rights under the Geneva Conventions or the U.S. Constitution.

Surprising to most observers, a majority of the Justices also seemed to take issue with the manner in which the Administration has constituted military tribunals for trials of those captured in the war on terrorism—which could result in another major setback for the Cheney gang which designed the tribunal system after 9/11.