

# House Dems' Hearing Exposes Danger Of Bush's Executive Power Grab

by Edward Spannaus

Denied a hearing room by the Republican leadership, Democratic members of the House Judiciary Committee held a well-attended hearing, in a basement catering room, on Jan. 20, at which witnesses and Members of Congress warned of the danger to the Constitution which is posed by the Administration's claim of unlimited executive power.

The hearing was held by Judiciary Committee Democrats, after committee chairman James Sensenbrenner (Wisc.) had ignored an earlier request for a hearing on the Administration's wiretapping program, which had been submitted to him by all 17 Democrats on the committee. The hearings came the day after the Justice Department released a 42-page memorandum attempting to justify the Administration's use of warrantless electronic surveillance by the National Security Agency (NSA) (see article, p. 46), which threw down the gauntlet to the Congress, with its claim that Congress can do nothing to rein in the President's "inherent powers" as Commander in Chief. The DOJ memo was dissected and discredited in detail by both Congress Members and hearing witnesses.

## No 'Maximum Leader'

"There can be little doubt that we're in a constitutional crisis that threatens the system of checks and balances that have preserved our fundamental freedoms for over 200 years," declared Rep. John Conyers (Mich.), the senior Democrat on the committee, in opening the hearing. "There's no better illustration of that crisis, than the fact that the President of the United States is violating our nation's laws by authorizing the National Security Agency to engage in warrantless surveillance of United States citizens."

This theme was picked up later by one of the witnesses, Prof. Jonathan Turley of George Washington University Law School, who said that disclosure of the NSA operation "has pushed this country deep into a constitutional crisis, and one that there are, frankly, few parallels [for] in our history."

"Our system of government rests on a certain axis, a balance of power, of a tripartite system, three branches, none of which have the authority to govern alone," Turley continued. "In that system, the very scourge is a 'Maximum Leader.' It runs against the constitutional grain. It creates a dangerous imbalance."

Turley pointed out that "President Bush has for many years asserted authority that is both absolute and, in my view, quite dangerous," and he identified the Administration's August 2002 "torture memo" as exemplary of the Administration's argument that the President could order government officials to violate U.S. law, and any limitation on the President's ability to order torture, would be "an unconstitutional infringement on his inherent authority." Additionally, said Turley, the President has unilaterally claimed the authority to declare an American citizen to be an enemy combatant and strip him of his constitutional rights. And then, on Dec. 30, the President signed the McCain anti-torture amendment, using a "signing statement" to declare that he reserved the right to violate that law. "Now, we know that there is an NSA operation based upon the same extreme theory of Presidential power," Turley said, adding: "The problem with these claims is that they are devoid of any limiting principle. They place this country on a slippery slope that inevitably leads to a Maximum Leader."

Referring to the Justice Department memorandum put out the previous day, Turley stated: "If there's any doubt about how extreme these claims are, I suggest you read that document."

Earlier, in his opening statement, Rep. Chris van Hollen (Md.) said of the DOJ memo, that "making their argument longer, did not make it any better," and that any private attorney who gave his client this kind of advice "would be sued for malpractice."

## It Was a Crime!

Returning to the NSA spying operation, Turley testified: "I want to be absolutely clear: What the President ordered in this case was a crime. . . . The Federal law makes it clear you cannot engage in this type of surveillance, in a domestic surveillance operation, without committing a crime that you can go to jail for, for five years."

"Now, we can debate the wisdom of that, we can debate why the President may have done it. But in my view, the President committed a crime. And we have to deal with that as citizens. And unfortunately, you have to deal with that as Members of Congress.

"But it also strikes me as an alarming circumstance, when

the President can go into a press conference and announce that he has violated a Federal statute 30 times, and promises to continue to do so until someone stops him. That's the most remarkable admission I have ever heard from a President of the United States."

### **Concentration Camps**

The first witness to raise the illegality of the NSA operation was a conservative Republican lawyer, Bruce Fein, who had served in the Reagan-Bush Justice Department. Fein pointed out that there was no reason that the President couldn't have come to Congress to seek an amendment to the Foreign Intelligence Surveillance Act (FISA), if he considered it too restrictive. And he noted that the FISA statute explicitly addresses war-time conditions, so it is "implausible" to argue, as the Justice Department does, that the Authorization of Force resolution for Afghanistan somehow overruled FISA. After elaborating these points, Fein declared, "I don't think anything more needs be said about the fact that he is violating FISA."

Under this "inherent constitutional authority" argument that the White House is making, Fein said, the President could do anything, including putting people in concentration camps, and ordering breaking-and-entering into people's homes.

Fein also emphasized that the powers that the President is claiming, are not temporary. We will be in a state of permanent hostilities against terrorism for the indefinite future, and so the powers claimed by the President "will become permanent fixtures of the political and legal landscape."

### **Worse Than Hitler in 1933**

The only witness who raised the parallels of the Administration's arguments with those of Nazi Germany was Rep. Jerrold Nadler (D-N.Y.), who stressed that "the legal arguments the Administration makes are not even debatable; they're frivolous arguments." These arguments "can only be made by a monarch, by someone who has tried to justify absolute power in the Executive branch."

There's no limit on what the President can do under their arguments, Nadler said. "And as I read their arguments, the President would have the inherent power to order a hit-man to walk in and murder anybody sitting in this room if he, in his sole discretion, thought that would help national security, and he would be accountable to no one for that judgment. That cannot be the law in the United States. Absolute power cannot be the law in the United States."

Then Nadler let loose his shocking conclusion:

"As I read the statements by the Justice Department, the power the President claims he has, if he were in Germany in 1933, he would not have required the Enabling Act to pass the Reichstag to claim the power"—referring to the emergency powers legislation, defended by Nazi Crown Jurist Carl

Schmitt, adopted following the Reichstag Fire. "He is claiming absolute power that no one in American history has ever claimed," Nadler concluded. "This cannot stand."

### **'High Crimes and Misdemeanors'**

Nadler also questioned Turley, who has studied and written extensively on the question of impeachment, as to whether the White House's violations of the FISA law constitute "high crimes and misdemeanors."

Turley said that if the President has violated criminal laws, there's no question but that it would meet the standard for impeachment. Congress's concern is not what a court might eventually say. "Your domain and responsibility is that if a President has committed a criminal act, you are obligated to hold hearings." And, Turley warned, the House is setting a very dangerous precedent by *not* holding hearings on this matter—referring, of course, to the fact that the Republican leadership has blocked any official committee hearings on the NSA operation.

Representative Nadler agreed that the issue for the House, is not whether a criminal act has been committed. "But the purpose of the impeachment provision was precisely, if you read *The Federalist*, to protect American liberty against the encroachments of a chief executive who would abuse his or her power to encroach upon liberty, regardless of whether it's a crime or not. But if it's a crime, it's a little more clear. So the question here really is, in terms of, is it a high crime or a misdemeanor, is it an unconstitutional encroachment upon liberty beyond the power of the President in so abusing his office?"

Turley responded by saying that "this type of violation should be a textbook example of an impeachment issue, because not only is it a Federal crime, but it violates the doctrine of separation of powers."

"When the President held up his hand and took an oath to God that he would uphold the United States Constitution, he was promising to uphold the doctrine of separation of powers. When a President says that he can't live within those limitations, it is, sort of, a self-disqualifying confession in terms of holding that office."

"This President's already stated quite clearly that he believes he can violate Federal law," Turley said a few minutes later. "That, for our system, is the equivalent of a declaration of war on the separation of powers."

Besides Turley and Fein, the other witnesses at the hearing, which was videotaped by C-SPAN, were: James Bamford, author of a ground-breaking book on the NSA, *The Puzzle Palace*; Caroline Frederickson, Washington legislative director of the American Civil Liberties Union; Kate Martin, director of the Center for National Security Studies; and Richard Hersh, spokesman for a Florida-based Quaker organization, The Truth Project, which was subjected to surveillance by military intelligence, resulting in a 400-page Defense Department report.