Congress To Fight On Patriot Act, Spying

by Edward Spannaus

On Dec. 16, the United States Senate blocked, by filibuster, the renewal of the USA/Patriot Act, in what was universally described as a "stinging rebuke" to the Bush-Cheney Administration. Four Republican Senators joined with 43 Democrats in a successful vote against cutting off debate.

That December morning, the Senate, and the whole nation, had been shocked by the *New York Times* revelation that the Administration had been using the National Security Agency (NSA) for a program of warrantless electronic surveillance of Americans, in clear violation of laws passed by Congress. Speaker after speaker that day cited the NSA disclosures as evidence that the Administration cannot be trusted, and some even wondered what the whole point was of debating and passing legislation, which the Administration then ignored.

Now, after an extended holiday recess, and the bruising Senate battle over the Supreme Court confirmation of Samuel Alito, the intertwined fights over the Patriot Act extension and the illegal NSA spying program are again taking center stage on Capitol Hill.

What is at stake here, is precisely the same fundamental issue as in the Alito confirmation: "emergency rule" police-state measures which are modelled on Nazi jurist Carl Schmitt's justification for the Hitler takeover in Germany in 1933-34.

Unresolved Patriot Act Issues

Although the Administration, and especially Vice President Dick Cheney, had threatened that it would not allow any extension of the Patriot Act without renewal of its 16 expiring provisions, President Bush was forced to bow to reality, and signed a one-month extension of the Patriot Act, which expired Feb. 3, while vowing that this would be the only extension.

Predictably, Congress was unable to come to any final agreement, among itself, and with the Administration, and thus, on Feb. 1, the House voted for another, five-week extension, on which the Senate followed suit, thus giving Congress until March 10 to resolve the questions surrounding the longer-term renewal of the Patriot Act.

The most contentious of its provisions are:

- National Security Letters, also called "administrative subpoenas," under which the FBI or other agency can demand documents without obtaining a court-issued subpoena.
- Business records seizures, allowing the Foreign Intelligence Surveillance Act (FISA) Court to authorize the obtaining of business and financial records, even library records, and barring the holder of the records from disclosing that the records have been seized, even to the person to whom the records pertain.
- Delayed-notification search warrants, under which Federal agents can secretly execute a search-and-seizure, and not notify the target for weeks or months. This is not restricted to terrorism investigations; the provision, also known as "sneak-and-peak," has been used in garden-variety white-collar criminal cases.
- "Roving" wiretaps, in which the FISA Court can allow interception of the communications of a target, regardless of what communications device he is using. Unless closely regulated, the use of roving wiretaps can easily violate the Fourth Amendment's requirement that a search warrant must specify with particularity the place to be searched.

As with other provisions of the Patriot Act which involve the FISA law, the Administration has rendered them irrelevant, by simply bypassing and ignoring FISA's legal requirements under its Carl Schmitt-like claim that the President can determine what the law is, irrespective of the other two branches of government.

Administration Exposes Its Own Lies

The Administration's duplicity is clearly demonstrated by the case of the "Patriot II" legislation which surfaced in early 2003. This was a complete, final but secret draft of new legislation prepared by the Justice Department, which was ready to be sprung in the event of a new terrorism incident or scare. But in February of 2003, someone in the Justice Department leaked the 86-page bill, plus a 33-page section-by-section textual analysis, to the Center for Public Integrity, which made it available to the public. (See *EIR,* Feb. 28 and May 2, 2003) In the wake of the uproar which followed, the draft—which Lyndon LaRouche dubbed "Himmler II"—was shelved, although parts of it were secretly implemented, or smuggled into the various amendments which were proposed around the renewal of the Patriot Act's expiring provisions.

As the Center for Public Integrity recently pointed out, the "Patriot II" draft absolutely undercuts the Bush-Cheney Administration's current contention that the President had full, "inherent" legal authority to conduct warrantless NSA surveillance of Americans without changing the FISA law.

The 2003 draft contained various provisions regarding FISA, including one for expanding FISA's 15-day wartime exception for obtaining advance court approval of wiretaps, so as to also permit this exception to be used after a Congressional authorization for the use of military force, or after an attack creating a national emergency. Since the exposure

of the NSA spy program, the Administration's specious, cobbled-together argument is that the 2001 Congressional authorization for the use of military force against al-Qaeda either 1) triggers the President's "inherent" powers as Commander in Chief, or 2) constitutes a "statute" which automatically amends the FISA law. Clearly, they did not rely upon this in 2002-03, or they wouldn't have considered it necessary to draft amendments to FISA for Congress to pass.

White House Stonewalls Senate

Heading into the Feb. 6 hearing of the Senate Judiciary Committee on NSA surveillance, the committee is being stonewalled by the White House, which is refusing to hand over its classified legal opinions which were used to justify its NSA spy operation.

The *New York Times* reported on Feb. 2 that there are two key memos at issue; the first was written by John Yoo of the Justice Department's Office of Legal Counsel (OLC) in late 2001 or early 2002, and is thought to contain "far-reaching and explosive legal theories," similar to those Yoo put into the "torture memos." Yoo—a proponent of the Nazi "unitary executive" doctrine—has repeatedly argued that Congress can make no law which infringes on the President's "inherent powers" as Commander in Chief.

The second key memo being sought by the Senate, is one written in 2004 by OLC lawyer Jack Goldsmith, who reportedly questioned the legality of the program. Goldsmith's role has come to public attention due to an article in the Feb. 6 issue of *Newsweek,* which profiled the ferocious fight that took place between the Cheney legal cabal (consisting of Addington, Yoo, and deputy White House legal counsel Timothy Flanigan—the grouping that *EIR* dubbed the "Torture Trio"), versus a group of lawyers in the Justice Department who opposed Cheney's drive for untrammelled executive power. The dissident group was centered around Goldsmith and Deputy Attorney General James Comey; the entire group was Republican political appointees, and most of them were denied promotions and driven out of the Administration.

The "chief opponent of the rebels," according to *Newsweek,* was Addington, who was known to speak for Cheney; he and Flanigan cut everyone else, but Yoo, out of the process of setting legal policy for the war on terrorism.

When Jay Bybee left as head of OLC in 2003, *Newsweek* reports, Addington and then-White House Counsel Alberto Gonzales wanted to make Yoo the head of OLC, but Ashcroft balked, because he was piqued at Yoo for going around him, directly to the White House. So Goldsmith, a law professor working at the Pentagon, was brought in, but, as *Newsweek* put it, "he did not intend to become a patsy for Addington and the hard-liners around Cheney."

Goldsmith, with the backing of Comey, refused to reauthorize the NSA wiretapping program in 2004, triggering the famous visit by Gonzales and White House Chief of Staff Andrew Card to then-Attorney General John Ashcroft in the hospital; Goldsmith and others did succeed in getting tougher standards imposed for warrantless eavesdropping, and, reported *Newsweek,* this "drove Addington to new levels of vexation with Goldsmith."

Thus, it is not surprising that the White House has refused to hand over the Yoo and Goldsmith memos to the Senate, despite the fact that several Judiciary Committee Democrats have requested the documents, as has the committee chairman Sen. Arlen Specter (R-Penn.), who has publicly stated that he believes that the NSA spying program violates the FISA law. Sen. Charles Schumer (D-N.Y.) says the committee should consider issuing subpoenas if the Administration continues to refuse to provide documents.

'Double Standard'

The fight over the Administration's conduct relative to the NSA spy program spilled over into the Feb. 2 hearing of the Senate Intelligence Committee, held to receive the intelligence community's annual global threat assessment, despite the efforts of committee chairman Sen. Pat Roberts (R-Ks.) to bar any discussion of the surveillance operation.

Sen. Jay Rockefeller (D-W.V.), the senior Democrat on the Intelligence committee, compared the Administration's selective use of intelligence before the Iraq war, to the Administration's selective disclosing and withholding of information concerning the NSA program now. Although the intelligence agencies are required by law to keep the Congressional intelligence committee informed on such matters, the White House has said that only the top two members of the committee can be briefed. Sen. Diane Feinstein (D-Calif.) elicited the information that the decision to withhold information from the rest of the committee was made by directly by Bush and Cheney.

But, while the White House is refusing to talk to the Senate, Rockefeller charged, it has launched a press campaign of putting top officials, "from the Vice President to the White House press secretary," out to talk about the program. Sen. Carl Levin (D-Mich.) called this a "double standard," in which the Administration wants to selectively put out information and even details about the program in public when defending it, but it refuses to give any information to Congress.

If, as expected, the Administration continues to stonewall Congress while defending its violations of the FISA law, many observers expect this to blow up the ongoing negotiations around the Patriot Act. This will not only give Congress another opportunity to crack down on Bush and Cheney's Nazi legal practices, but may show the necessity of pursuing impeachment proceedings as well.

The author can be reached at edspannaus@larouchepub.com