



Written by [Joe Wolverton, II, J.D.](#) on July 2, 2013

## Former Surveillance Court Judge Disputes Charge of Coordination With NSA

Judges who sit on the secret court charged with approving surveillance of American citizens are mad. One former occupant of the FISA court bench isn't happy with the way she and her colleagues have been portrayed as rubber stampers of the National Security Agency's (NSA) efforts to eradicate the civil liberties protected by the Constitution.



This is the story told in a June 29 *Washington Post* article entitled "[Secret-court judges upset at portrayal of 'collaboration' with government.](#)"

Weeks ago, the *Post* and *The Guardian* (U.K.) revealed the NSA's [dragnet seizure of telephone records of millions of Americans](#) and the [real-time tapping of Internet activity](#) of people not suspected of committing any crime. As *The New American* has reported, many of the country's largest Internet companies have cooperated with the federal government in its quest to watch and record the online behavior of all Americans.

FISA court (officially the Foreign Intelligence Surveillance Court) judges don't want to be lumped in with the collaborators with the construction of the surveillance state.

The *Washington Post* reports on the recent riling up of one of the FISA court judges:

U.S. District Judge Colleen Kollar-Kotelly, the former chief judge of the [Foreign Intelligence Surveillance Court](#), took the highly unusual step Friday of voicing open frustration at the account in the report and court's inability to explain its decisions.

"In my view, that draft report contains major omissions, and some inaccuracies, regarding the actions I took as Presiding Judge of the FISC and my interactions with Executive Branch officials," Kollar-Kotelly said in a statement to *The Post*.

The draft report referred to by Kollar-Kotelly was filed in 2009 by the inspector general of the NSA. The classified report was included in the cache of documents leaked by Edward Snowden. According to the *Post*, the report contained "some details about the interaction between the court's judges and the NSA, which sought approval for the Bush administration's top-secret domestic surveillance programs."

In the *Washington Post* story, Kollar-Kotelly refutes the notion that the court she once sat on was guilty of "coordination" with the NSA and the federal domestic spying apparatus.

"That is incorrect," she said, as reported in the *Post*. "I participated in a process of adjudication, not 'coordination' with the executive branch. The discussions I had with executive branch officials were in most respects typical of how I and other district court judges entertain applications for criminal wiretaps under Title III, where issues are discussed ex parte."

It is the ex parte element of the FISA court's proceedings that give rise to the accusations of



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collaboration.

Unlike traditional hearings, at the FISA court, a representative of the Justice Department presents the federal government's case, arguing for permission to begin surveillance of an identified target. That target, however, is not afforded the same opportunity for representation. In terms of due process, that means that the person being targeted by the NSA or other government agency is not allowed to challenge the surveillance or the evidence of the government's compelling interest in his data or the content of his electronic communication.

As a former Justice Department official explained, as quoted in the *Post*, "There is a collaborative process that would be unnatural in the public, criminal court setting."

In a criminal court, an accused person is guaranteed [substantive and procedural due process](#). These safeguards are designed to protect the innocent and to require that the government have convincing evidence of the commission of some crime on the part of the accused.

This essential guard against despotism is eliminated in the FISA court. The accused are denied even cursory due process. This chilling fact of FISA court procedure is made even worse when one considers that nearly every request made by the federal snoops is approved by these "judges."

As required by provisions of the Foreign Intelligence Surveillance Act Amendments of 2008 (FISA) and the Patriot Act (as amended in 2005), the Department of Justice revealed to Congress in April the number of applications for eavesdropping received and rejected by the FISA court.

In [the letter addressed to Senator Harry Reid](#) (D-Nev.), the Justice Department reported that in 2012, of the 1,789 requests made by the government to monitor the electronic communications of citizens, not a single one was rejected.

The court, established specifically to judge the merits of applications by the government to spy on citizens, gave a green light to every government request for surveillance.

Perhaps Judge Kollar-Kotelly should have reviewed the details of this letter before she claimed that there was no "coordination" between the FISA court and the federal government's surveillance agencies.

Not content to be a mere formality for electronic surveillance, the FISA court also held the coats of the FBI while that agency carried out the searches and seizures set out in 212 applications.

Perhaps the most disturbing effect of these FISA court figures is the fact that the government considers the protections of the Fourth Amendment to be nothing more than a "[parchment barrier](#)" that is easily torn through. Now that the Constitution is regarded by the federal government as advisory at best, there is nothing standing between the citizens of this nation and the construction of a 21st century [panopticon](#).

In this country, then, every citizen is now a suspect and the scope of the surveillance is being expanded to place every word, every movement, every text, every conversation, every e-mail, and every social media post under the never-blinking eye of the federal domestic spying apparatus.

The hour is now late if this Republic is to remain a land under the rule of law. To that end, it is critical that Americans recognize that the FISA court's rubber stamping of the exercise of such sweeping surveillance programs is in direct, open, and hostile violation of the Constitution. The [Fourth Amendment to the Constitution](#) clearly states:



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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The way the FISA court works sounds very similar to the [Star Chamber](#), an English court of the 14th to 17th centuries that met in secret, with no record of indictments, no identification of witnesses, and no transcript of the proceedings.

Eventually this court was used as a political weapon, a way for the king and the Parliament to persecute their enemies and keep the dirty details hidden from the public.

The analogy of the FISA court's absolute approval of requests by the government to monitor citizens' electronic communication to the decisions of the Star Chamber is apt and accurate on many points.

Undoubtedly, Kollar-Kotelly would argue against the aptness of the analogy and the strength of the evidence.

Of course, in her defense, during her time presiding over the one-sided, lopsided FISA court, perhaps she forgot the role of considering evidence in the pursuit of justice.

What is without doubt, however, is that from the NSA to the IRS, President Obama has accelerated the weaponization of executive branch agencies of the federal government. Since successfully carrying out this conversion, he has used them to carpet bomb civil liberties, leaving the Constitution — and the justice it was meant to “establish” — lying in a heap of rubble.

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