

ARLEN “SCOTTISH HAGGIS” SPECTER ENUMERATES BUSH’S LAW-BREAKING

(Thanks to Selise for the YouTube)

Yesterday, Scottish Haggis went even further than he did the other day the other day in asserting that Bush broke the law when he instituted his illegal wiretapping program. He asserted flatly that Bush had violated two statutes (FISA and the National Security Act).

I believe it is vital that the courts remain open. I say that because on our delicate constitutional balance of separation of powers, the Congress has been totally ineffective on oversight and on restraining the expansion of executive authority. But the courts have the capacity, the will, and the effectiveness to maintain a balance.

But we find that the President has asserted his constitutional authority under article II to disregard statutes, the law of the land passed by Congress and signed by the President.

I start with the Foreign Intelligence Surveillance Act, which provides that the only way to wiretap is to have a court order. **The Executive Branch initiated the Terrorist Surveillance Program in flat violation of that statute.** Now, the President argues that he has constitutional authority which supersedes the statute. And if he does, the statute cannot modify the Constitution. Only a constitutional amendment can. But that program, initiated in 2001, is still being litigated in the courts. So we do not

know on the balancing test whether the Executive has the asserted constitutional authority.

But if you foreclose a judicial decision, the courts are cut off. **Then the executive branch has violated the National Security Act of 1947, which mandates that the Intelligence Committees of both the House and the Senate be informed of matters like the Terrorist Surveillance Program.** I served as chairman of the Judiciary Committee in the 109th Congress. The chairman and the ranking member, under protocol and practice, ought to be notified about a program like that. But I was surprised to read about it in the newspapers one day, on the final day of argument on the PATRIOT Act Re-authorization. It was a long time, with a lot of pressure—really to get the confirmation of General Hayden as CIA Director—before the executive branch finally complied with the statute to notify the full Intelligence Committees.

Now, on the other hand, the courts have been effective—and I will amplify this at a later time because I want to yield soon to Senator *Whitehouse* and give the opponents an opportunity to speak before 4:30. But in the Hamdan case, the Supreme Court held that the President does not have a blank check in the war on terror. Justices held that the President cannot establish military commissions unless Congress authorizes it. In Hamdi, the Supreme Court concluded due process required that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that contention. In *Rasul v. Bush*, the Supreme Court held that the Federal habeas corpus statute gave district courts jurisdiction to hear challenges

by aliens held at Guantanamo Bay.

Well, this is not Pakistan, where President Musharraf can suspend the Supreme Court Justices and hold the Chief Justice under House arrest. This is America. The balance is maintained only because the courts are open. I believe it would be a major mistake to close the courts on pending litigation when the courts have provided the only effective way to check expanded executive authority, which we have seen in many lives. **I will amplify those later, on matters such as signing statements.** [my emphasis]

Two points about this. First, Haggis made a special point to say it was the executive branch—and not the President—that violated the National Security Act. You think Haggis is still pissed Dick Cheney bypassed him on the illegal wiretap program?

Also, Kit Bond tried to rebut Haggis' point by claiming the entire Gang of Eight was briefed on the program. As the schedule of briefings shows, that is false. I wonder how Haggis feels about the fact that Bond is as disingenuous responding to Haggis' arguments as he is to Feingold's?