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Rare scrutiny for a court used to secrecy

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Wedged into a secure, windowless basement room deep below the Capitol Visitors Center, U.S. District Court Judge John Bates appeared before dozens of senators earlier this month for a highly unusual, top-secret briefing.

The lawmakers pressed Bates, according to people familiar with the session, to discuss the inner workings of the United States' clandestine terrorism surveillance tribunal, which Bates oversaw from 2006 until earlier this year.

Bates had rarely spoken of his sensitive work. He reluctantly agreed to appear at the behest of Senate Intelligence Committee Chairman Dianne Feinstein (D-Calif.), who arranged the session after new disclosures that the court had granted the government broad access to millions of Americans' telephone and Internet communications.

The two-hour meeting on June 13 featuring Bates and two top spy agency officials — prompted by reports days earlier by The Washington Post and Britain's Guardian newspaper about the vast reach of the programs — reflects a new and uncomfortable reality for the Foreign Intelligence Surveillance Court and its previously obscure members. Within the past month, lawmakers have begun to ask who the court's judges are, what they do, why they have almost never declined a government surveillance request and why their work is so secretive.

The public is getting a peek into the little-known workings of a powerful and mostly invisible government entity. And it is seeing a court whose secret rulings have

in effect created a body of law separate from the one on the books — one that gives U.S. spy agencies the authority to collect bulk information about Americans' medical care, firearms purchases, credit card usage and other interactions with business and commerce, according to Sen. Ron Wyden (D-Ore.).

"The government can get virtually anything," said Wyden, who as a member of the Senate Intelligence Committee is allowed to read many of the court's classified rulings. "Health, guns, credit cards — my reading is not what has been done, it's what can be done."

Members of Congress from both parties are pursuing legislation to force the court's orders into the open and have stepped up demands that the Obama administration release at least summaries of the court's opinions.

Critics, including some with knowledge of the court's internal operations, say the court has undergone a disturbing shift. It was created in 1978 to handle routine surveillance warrants, but these critics say it is now issuing complex, classified, Supreme Court-style rulings that are quietly expanding the government's reach into the private lives of unwitting Americans.

Surveillance court judges are selected from the pool of sitting federal judges by the chief justice of the United States, as is required by the law that established the panel. There is no additional confirmation process. Members serve staggered terms of up to seven years.

Typical federal courts are presided over by judges nominated by presidents and confirmed by the Senate. Cases are argued by two opposing sides; judges issue

orders and opinions that can be read, analyzed and appealed; and appellate opinions set precedents that shape American jurisprudence.

The surveillance court is a different world of secret case law, non-adversarial proceedings, and rulings written by individual judges who rarely meet as a panel.

Judges generally confer only with government lawyers, and out of public view. Yet the judges have the power to interpret the Constitution and set long-lasting and far-reaching precedent on matters involving Americans' rights to privacy and due process under the Fourth Amendment. And this fast-growing body of law is almost entirely out of view of legal scholars and the public. Most Americans do not have access to the judiciary's full interpretation of the Constitution on matters of surveillance, search and seizure when it comes to snooping for terrorist plots — and are limited in their ability to challenge it.

All 11 of the current members were tapped by Chief Justice John G. Roberts Jr. Ten were originally appointed to the federal bench by Republican presidents. Six are former prosecutors.

"The judges that are assigned to this court are judges that are not likely to rock the boat," said Nancy Gertner, a former federal judge from Massachusetts who teaches at Harvard Law School. Gertner, a former defense and civil rights lawyer named to the bench by Democrat Bill Clinton, added: "All of the structural pressures that keep a judge independent are missing there. It's one-sided, secret, and the judges are chosen in a selection process by one man."

Steven Aftergood, director of the government secrecy program at the Federation of American Scientists, called the court "an astonishing departure from what we thought we knew about the judiciary."

Defending the court

Several current and former members of the court, as well as government officials, reject the criticism. They say internal checks are built into the system to ensure Americans' rights are not violated.

The court's current chief, D.C. District Court Judge Reggie B. Walton, was so perturbed about recent critiques of the court that he issued a rare public statement in the wake of newspaper reports about the court's approval of the phone and Internet surveillance programs.

"The perception that the court is a rubber stamp is absolutely false," Walton said. "There is a rigorous review process of applications submitted by the executive branch, spearheaded initially by five judicial branch lawyers who are national security experts and then by the judges, to ensure that the court's authorizations comport with what the applicable statutes authorize."

Administration officials echoed those sentiments last week during a public hearing before the House Intelligence Committee, telling lawmakers that the process of seeking approval for a new warrant takes extensive time and effort. The judges "push back a lot," said Deputy Attorney General James Cole. "These are very thick applications that have a lot in them. And when they see anything that raises an issue, they will push back and say, 'We need more information.'"

Roberts and an aide vet judges as candidates for the secret court. The contenders, who have undergone Senate confirmation for their original judicial posts, are screened again using an unusually exhaustive FBI background check that examines their lives "going back to birth," according to a person with knowledge of the process. Candidates are told to withdraw if anything in their lives could prove embarrassing — the chief justice reads each FBI report. He has rejected candidates for traits such as excessive alcohol use, the person said.

The court was expanded from seven judges after the attacks of Sept. 11, 2001. At least three of the judges must live in the Washington area to ensure that a judge is always personally reachable by government officials in case of emergencies. Court members also continue to manage their regular dockets as district judges.

One of the most recent appointees, Judge Michael W. Mosman of Oregon, drew

attention in 2008 when, in his position as a district court judge, he temporarily blocked a new state law allowing gay people to obtain domestic-partnership status.

Days after U.S. District Judge Rosemary M. Collyer's March appointment to the secret court, her decision in a high-profile case involving government secrecy was overturned. She had ruled that the CIA could keep secret its list of drone targets, but a higher court overruled her.

Another member is Susan Webber Wright, the Arkansas judge who presided over the Paula Jones sexual-harassment suit against Clinton and famously held the president in contempt.

Walton is a former prosecutor who sentenced former Richard B. Cheney adviser I. Lewis "Scooter" Libby to more than two years in prison for his role in the Valerie Plame leak case. President George W. Bush later commuted Libby's sentence.

Court officials reject suggestions that the judges reflect any partisan or ideological bent. They note that two former presiding judges — Joyce Hens Green and Colleen Kollar-Kotelly — were appointed to the federal bench by Democratic presidents. Neither is currently on the surveillance court.

Judges say they take the roles seriously.

"There's no question that every judge who has ever served on this court has thought it was the most significant thing they've ever done as a judge," U.S. District Judge Royce C. Lamberth said in a rare public interview on the subject posted on a federal court Web site in 2002. "When I did the hearings on the embassy bombings in Africa, we started the hearings in my living room at 3:00 in the morning. And some of the taps I did that night turned out to be very significant and were used in the New York trials of the people indicted for the bombings."

Tensions have bubbled to the surface in recent days, with some of the court's judges privately expressing frustration that it has become the center of attention and an object of criticism. They note that Congress helped pass the laws allowing the govern-

ment's broad spying powers and that the administration instructs the court to keep its inner workings secret.

Walton, who took over as chief earlier this year, issued an order last month demanding that the Obama administration respond to a request from a civil liberties group, the Electronic Frontier Foundation, for the release of a classified ruling in which the court found that the government had engaged in unconstitutional surveillance of Americans. The court has even taken the rare step over the past two weeks of creating a public docket Web page featuring the Electronic Frontier Foundation case as well as a separate, new motion brought by the American Civil Liberties Union seeking records of the phone surveillance program.

Bates's June 13 appearance before lawmakers came after Feinstein, a staunch defender of the program, called Roberts to request that he dispatch Bates to the briefing. The session was open to all senators; 47 attended, according to someone familiar with the meeting.

Bates, a former prosecutor and Bush-appointed judge in the D.C. district court, rebuffed several questions about the court's orders, telling senators they should address their questions to executive branch officials, according to people briefed on the session. He stressed that the government's collection and surveillance programs were classified as top-secret by the Obama administration, not by the judiciary.

Still, the government almost always gets much of what it wants from the court.

In 2012, the court received 1,789 requests for electronic surveillance, according to the annual report it files with the Senate. One was withdrawn. The rest were approved, sometimes after back-and-forth interactions in which judges required the government to tweak or scale back its plans. Significant opinions in recent years have been sent to congressional intelligence committee members but remain classified.

'Expansive' rulings

Now, outside critics, lawmakers and some with internal knowledge of the court

The Foreign Intelligence Surveillance Court

The 11 judges on the panel are selected from the pool of sitting federal judges by the chief justice of the United States. Members serve staggered terms of up to seven years, and at least three must live in the Washington area.

Source: Administrative office of the U.S. Courts



Reggie B. Walton

A judge for the U.S. District Court for the District of Columbia, Walton is the presiding judge on the Foreign Intelligence Surveillance Court. He was nominated to the bench by President George W. Bush in 2001 after a career as a prosecutor, D.C. superior court judge and White House adviser on crime for President George H.W. Bush.



Rosemary M. Collyer

A judge on the U.S. District Court for the District of Columbia, Collyer was first nominated to the bench by Bush in 2002 after working in private practice and serving as the general counsel to the National Labor Relations Board.



Raymond Joseph Dearie

A U.S. District Court judge for the Eastern District of New York, Dearie was nominated to the bench by President Ronald Reagan in 1986 after a career as a prosecutor and private-practice lawyer.



Claire Eagan

A U.S. District Court judge for the Northern District of Oklahoma, Eagan was nominated by Bush in 2001 after serving as a U.S. magistrate judge and a career in private practice.



Martin Leach-Cross Feldman

A U.S. District Court judge for the Eastern District of Louisiana, Feldman was nominated to the bench by Reagan in 1983 after a career in private practice and a stint as a captain in the U.S. Army Reserve Judge Advocate General Corps.



Thomas Francis Hogan

A U.S. District Court judge for the District of Columbia, Hogan was nominated by Reagan in 1982 after stints in private practice and as a law school professor.



Mary A. McLaughlin

A U.S. District Court judge for the Eastern District of Pennsylvania, McLaughlin was nominated by President Bill Clinton in 2000 after a career as a prosecutor, law school professor, private-practice lawyer and counsel to the Senate Judiciary Committee.



Michael W. Mosman

A U.S. District Court judge in Oregon, Mosman was nominated by Bush in 2003 after a career as a prosecutor and private-practice lawyer.



**F. Dennis
Saylor IV**

A U.S. District Court judge in Massachusetts, Saylor was nominated by Bush in 2003 after a career as a prosecutor, Justice Department official and private-practice lawyer.



**Susan Webber
Wright**

A U.S. District Court judge for the Western District of Arkansas, Wright was nominated to the bench by George H.W. Bush in 1989 after a career as a law school professor.



**James Block
Zagel**

A U.S. District Court judge for the Northern District of Illinois, Zagel was nominated by Reagan in 1987 after a career as a prosecutor and a stint as director of the Illinois State Police.

Two judges currently sit on the Foreign Intelligence Surveillance Court of Review. One slot on the panel is vacant.



**Morris Sheppard
Arnold**

A U.S. District Court judge for the Western District of Arkansas, Arnold was nominated to the bench by Reagan in 1985 after working as a law school professor.



**William Curtis
Bryson**

A U.S. Court of Appeals judge for the Federal Circuit, Bryson was nominated to the bench by Clinton in 1994 after serving in numerous posts at the Justice Department.

are starting to push for an overhaul.

Wyden said the surveillance court has issued “pretty stunning rulings, rulings that I think are about as expansive as anything you can imagine.”

Wyden pointed to court orders authorizing collection of bulk phone data, which The Post reported had dated to 2006, as indicators of the court’s broad view of government powers. At issue is a provision of the Patriot Act, passed by Congress after the Sept. 11 attacks, which permitted the FBI to compel the production of “business records” deemed relevant to terrorism and espionage investigations and to share those with intelligence officials.

Those orders followed a turbulent time for the secret court. Some judges were outraged that they had not been aware of the Bush administration’s warrantless wiretapping operation, which was first reported by the New York Times in late 2005. One member of the panel, U.S. District Judge James Robertson, resigned in protest, confiding to colleagues that he was concerned the program may have been illegal and could have tainted the court’s work.

One person close to the court, speaking on the condition of anonymity to discuss the secretive body, said the newly revealed orders indicate a shift in which the court blesses the bulk collection of Americans’ communications data to make investigations easier rather than weighing the merits of violating the privacy of one person on

a case-by-case basis. Before this change, the person said, “it was one warrant at a time.”

The court’s under-the-radar approach proved a particular challenge this spring to the Electronic Frontier Foundation when it sought to file its motion seeking release of the prior finding of the unlawful government surveillance. It turned out that the mere act of finding the court proved a steep hurdle.

Repeated calls to the court clerk from the foundation went unreturned, said David Sobel, an attorney for the group. The group wound up submitting the motion through a staffer at the Justice Department, whose officials were actively opposing the group’s efforts.

“We never had any direct contact with the court,” Sobel said, “and the other party in the proceeding was the gatekeeper.”

Chief Justice Roberts himself signaled some discomfort with the system during his 2005 confirmation hearings.

“I’ll be very candid,” he told senators. “When I first learned about the FISA court, I was surprised. It’s not what we usually think of when we think of a court. We think of a place where we can go, we can watch, the lawyers argue, and it’s subject to the glare of publicity. And the judges explain their decision to the public and they can examine them. That’s what we think of as a court.”

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