

FEINGOLD'S QUESTIONS

I'm still working through AGAG's answers to a bunch of questions the Senate Judiciary Committee asked him last year (he only answered early this year). There's an exchange involving Russ Feingold that is, I think, very instructive for understanding the recent FISA amendment.

You indicated at the hearing that the Administration has agreed to "submit" the program to the FISA court to rule on it if Congress passes the bill the Administration agreed to. If the FISA court were to review the program, would it do so in secret, and with only the government participating? Who would argue the case on the other side?

The Government is the only party to the ex parte proceedings for electronic surveillance orders under FISA (as is the case with respect to wiretap orders in criminal investigations under Title III and generally in proceedings to secure search warrants). Proceedings before the FISA Court are held in secret because of the nature and sensitivity of the information presented to the Court.

Feingold is talking about a different bill (Specter's proposed bill from last year), but I think the answer is instructive. Not because it tells us anything we don't know—yes, FISC's proceedings are secret, yes, in a review before FISC, there will be no antagonist to the government arguing in favor of civil liberties.

But I think Feingold gets to the heart of issues that are also true for the amended FISA program. The review we're talking about is inadequate because it doesn't allow the public, or even another lawyer, to challenge the government's program.