

ENIGMATIC TERMS

Luckily, Harry Reid has put off the Senate vote on the FISA amendment, because I never finished my series showing that the current amendment will legalize data mining. Man oh man oh man, am I looking forward to meeting the deadline I'm on, celebrating a late Turkey Day with friends this weekend, then going into a blog and bill paying frenzy next Monday.

In the meantime, I direct you to Marty Lederman's latest post, which notes that as far back as Poppy's day, they were deliberately obfuscating the purpose of their FISA amendments.

Seventeen years ago, the very first Bush (41) Administration was considering whether to ask Congress for an amendment to FISA very similar to the one the current Administration is now seeking. Mary Lawton, the FISA guru within DOJ at the time (she tragically died shortly thereafter), wrote a memo to Daniel Levin in the Deputy's Office (yes, *that* Daniel Levin) discussing why such a proposal might not be such a good idea. That memo has recently been released under FOIA. (Hat tip to David Kris for obtaining it and bringing it to my attention.)

The most important sentence in the memo, I think, is this one, in the penultimate paragraph:

"It should also be noted that **the proposed amendment to FISA to resolve the NSA problem . . . is certain to be written in such enigmatic terms that only those who have been briefed in executive session will understand them.**"

Truer words were never written. And that's why it is, indeed, almost impossible to have a serious, informed legislative and public debate about

proposed FISA reforms – because the public (and most legislators) can never be let in on what the amended statute would actually *do*: it's secret law. [my emphasis]

I think little details of what the new FISA amendment entails have slipped out here and there. But the fact remains, not all legislators know what they're doing here, and almost no citizens know what they're doing. And then there are people like Joe Klein obfuscating what little is known, because he can't be bothered to read the public documents about the program.

Well, until I return to all this Monday, I'll leave you with one other passage from the Poppy-era memo.

When FISA was initially considered there were strong dissents opposing its enactment on grounds of separation of powers. The Administrations of Presidents Ford and Carter backed the legislation, however, because of the practical imperative of continuing to collect foreign intelligence in the face of growing resistance from the communications common carriers whose cooperation was essential.

Had Junior asked Poppy, perhaps he wouldn't have gotten the telecoms into the legal fix they're currently facing in the first place.