

SHELDON WHITEHOUSE'S SPEECH

Whitehouse used his time to accuse AG Mukasey and DNI McConnell of being disingenuous in their public statements on FISA. As Whitehouse points out, the key issue (for him, in that he is alright with immunity) is how the government will be permitted to spy on Americans. Here's his speech.

Just recently, the Attorney General of the United States published an opinion piece in the *Los Angeles Times* on our ongoing work to improve the Foreign Intelligence Surveillance Act (FISA). This follows closely on a similar opinion piece by Director of National Intelligence Mike McConnell in the *New York Times*. I ask unanimous consent that each of these be entered into the Record.

Both go on at some length about the importance of new legislation on foreign surveillance activities. They devote paragraph after paragraph to this. But the two leaders of America's law enforcement and intelligence communities completely ignore – never once mention – the issue that is actually in dispute here: *on what terms will we allow this administration to spy on Americans?*

The heart of our debate today is the question of spying on Americans, 1. when they are outside the country, or 2. when they are incidentally intercepted by surveillance targeted at someone else.

This – wiretapping of Americans – has been the entire subject of our work on surveillance – and Judge Mukasey and Admiral McConnell never once even mention the topic.

There are really only two possibilities

here, and each is regrettable. One is that these two gentlemen simply don't know what is going on. That seems unlikely, because Director McConnell at least has participated in hearings on the subject, where we've discussed in detail our concerns about wiretapping Americans, and members of my staff are working through the details of the issue on a nearly daily basis with lawyers from the Office of the Director of National Intelligence and the Department of Justice.

So that leaves only one alternative: that these two gentlemen *do* know what is going on, and just choose to talk past the real issue; ignore its very existence. That is a shame, and I hope it is not the early propaganda phase of a Bush Administration effort to replicate the August stampede that got us into this pickle.

Since they haven't mentioned it, here's the problem.

The Protect America Act, passed in the August stampede, contains no statutory limitation on this administration's ability to spy on Americans traveling abroad whenever it wants, for whatever purpose.

The only limitation that now exists on that power is Executive Order 12333, which says that the administration will not wiretap Americans overseas unless the Attorney General determines that that person is an agent of a foreign power.

The problem, as I noted in a speech in this Chamber recently, is the following proposition, contained in a secret Bush Administration Office of Legal Counsel memo related to surveillance activities:

"An executive order cannot limit a

President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it."

In other words, the only thing standing between Americans traveling overseas and a government wiretap is an executive order that this President believes he is under no obligation to obey, and may secretly disregard.

For months, as we have worked to repair the flawed bill of August, the question of spying on Americans has been the issue of concern.

I and my staff, and many of my colleagues and their staffs, have been working diligently and in good faith to solve this problem.

What I have seen has been a thoughtful exchange by well-intentioned people who are committed to keeping America safe without trampling on the rights of Americans. We have talked not only with one another, on both sides of the aisle, but with people in this administration – including the staff attorneys at the DOJ and DNI. We have worked almost all the way toward making sure that Americans who are incidentally intercepted enjoy meaningful "minimization" protections. We have worked I think all the way toward making sure that a court order is required to wiretap an American who happens to be overseas.

For *both* Director of National Intelligence McConnell and Attorney General Mukasey to write op-eds as if the issue of spying on Americans abroad has no role in this debate, when it has been the key and central issue in this

debate, is disappointing. How big does the elephant have to be before they acknowledge it's in the room?

Ignoring this problem may serve the Bush/Cheney interest in unaccountable executive power. But it does not protect Americans' privacy, and it does not make America safer.

I urge my colleagues to remember that the issue we are grappling with is a simple one: on what terms will we allow this administration to spy on Americans? It is a question with real implications for our democracy, our civil liberties, and ultimately, the security of this nation.

Unless we really believe that when Americans leave our country, we leave our civil liberties behind; unless we really believe that this government should have unfettered power to eavesdrop on conversations of families vacationing in Europe or soldiers serving in Iraq; then the authority to spy on Americans abroad cannot be left under the exclusive control of this administration. It is a matter that *must* be solved in the legislation Congress passes dealing with foreign intelligence.

That is why we have been working on this question so hard.

This is a serious question – I wish the two gentlemen leading the key departments of government involved had recognized that it exists – and I urge my colleagues to insist on the protections we have worked so hard for, that protect Americans from surveillance, as we go forward on this legislation.

We have come a long way. Chairman Rockefeller is owed our gratitude, and

Chairman Leahy. I appreciate the efforts of the distinguished ranking members, Senators Kit Bond and Arlen Specter.

We are on the verge of an historic moment. Let us not let this moment slip away.

One wonders, how big does the elephant have to be in the room before they acknowledge it? Ignoring it may serve Bush and Cheney.

I think DiFi was supposed to come up right afterwards (Dodd got up for a few minutes, but has ceded to DiFi) to introduce amendments to fix the minimization and overseas spying issue.