

WHY DID REID PULL THE BILL?

This rather snotty article from the WaPo says that Reid didn't pull the FISA bill yesterday because of Dodd's efforts.

Reid spokesman Jim Manley said the decision had nothing to do with the efforts of Dodd and his allies. Indeed, for most of yesterday, Dodd appeared to be fighting a losing battle. His initial filibuster effort was steamrolled when the Senate voted 76 to 10 to take up the measure at noon.

Manley is, of course, full of shit. At the very least, Reid did the math to see that Dodd could filibuster this issue until the Christmas break, and since Reid intended to get funding done before the break, he was faced with postponing the break or punting the appropriations bills to the next year. So whatever else caused Reid to pull the bill, Dodd's demonstration that he was willing to hold the Senate floor was one factor (apparently, Dodd only left the floor once during yesterday's debate).

Snotty article also points to the amendments as one of the reasons Reid pulled the bill.

But in the face of more than a dozen amendments to the bill and guerrilla tactics from its opponents, Reid surprised his colleagues when he announced there would not be enough time to finish the job.

Now, best as I can count, I think I know of at least five amendments:

1. Dodd's amendment to pull immunity from the bill
2. DiFi's amendment to declare

FISA the exclusive means of electronic tapping

3. DiFi's amendment to have the FISA Court review the authorizations the telecoms got before they received immunity
4. [I think] A Whitehouse amendment to prohibit wiretapping of US Persons abroad
5. [I think] A Whitehouse amendment to provide oversight of minimization
6. Update: Beth Meacham says Leahy's amendment—to substitute the SJC bill—came up just before Reid pulled the bill (thanks Beth).

I'll try to clarify these later today. In addition, I'm sure there were going to be Republican amendments seeking to allow Bush to wiretap each and every Dirty Fucking Hippie and similar authoritarian fun.

Now, here's what I understand would have happened last night: at some point, Reid would have called for the amendment fun to start. The Dodd crowd didn't expect Reid to allow the full 30 hours of debate, but we got through about 8 of them, and no one expected even that much time to elapse. As I understand it, Reid was busy trying to figure out how to proceed after Dodd refused to agree to the unanimous consent. Had it come to it, Dodd's amendment would have been the first to be considered, and it would have failed. At that point, Dodd's filibuster would have officially started, which would have lasted roughly 24 hours, before he collapsed and we moved onto the other amendments. Presumably, once Dodd got some sleep, he could launch

another filibuster. So one of the problems, for Reid, with all those amendments, is that they gave Dodd multiple opportunities to filibuster, with breaks in between.

DiFi's Amendment

But here's the other thing. I'm fairly certain DiFi said she was supporting Whitehouse's amendments (though I need to check this). She also said, quite clearly, that **she would have a hard time voting for immunity if her own amendment didn't pass**. In other words, a key block from the "bipartisan" crowd who had originally supported the SSCI bill was going soft on it, threatening to vote against the bill if it didn't have some kind of compromise on immunity. Now, DiFi is famous for disappointing Democrats—but she did seem to be sending a clear message, at a time when the debate was still quite public.

So what was DiFi's amendment? As I understand it (again, I'll try to get clarification later), her amendment would have added one wrinkle to the immunity provision as currently written. It would have required the FISA Court to review the authorizations the telecoms received, to see whether they were legal, before the telecoms got immunity. If the FISA Court determined that those authorizations were not adequate under the law, then the telecoms would not get immunity. I have no idea what would happen then—I presume they would just revert back to non-FISA Courts to rule on and we'd get back into the State Secret dance we're currently doing. Though with the added information that the FISA Court had reviewed all the stuff the Bush Administration was claiming State Secrets over, and determined that the telecoms had indeed broken the law. But DiFi's amendment would provide a way for a Court (albeit a secret one) to determine that the telecoms had broken the law when they complied with the Administration's request.

Why DiFi's Amendment Would Be a Poison Pill

Now, before Orrin Hatch started accusing

"partisan blogs" of fear-mongering on this debate, he had an apoplectic fit about DiFi's amendment, lumping it in with more generalized DFH opposition to immunity. He strongly suggested DiFi's amendment would be a poison pill for him—and presumably the other Republicans following Dick Cheney's orders dutifully.

And there's a reason for that. When the SSCI passed their immunity bill, they did so only by inventing the fiction that it was legal for telecoms to wiretap at the behest of the government if they had the authorization of the Attorney General or "certain other officers." They did so because they know—having read the authorization letters—that one of the letters (presumably the one for March 11, 2004), was signed by White House Counsel Alberto Gonzales. Here's part of a post I did explaining this dodge.

As SSCI points out, the telecoms would be immune from prosecution if they had been authorized to conduct wiretaps under 18 U.S.C. § 2511(2)(a)(ii).

Under the existing statutory scheme, wire or electronic communication providers are authorized to provide information and assistance to persons with authority to conduct electronic surveillance if the providers have been provided with (1) a court order directing the assistance, or (2) a certification in writing signed by the Attorney General **or certain other officers** that —no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.|| See 18 U.S.C. § 2511(2)(a)(ii).

I've bolded those words, "or certain other officers," to emphasize that Jello Jay and the Republicans didn't actually specify what the law says. So let's look at the law, shall we?

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

The law says that only the AG or someone specified in 2518(7) may provide the telecoms with the certification that their actions are legal. Here's what 2518(7) says:

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by **the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney** of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that— [my emphasis]

So the only people who may give telecoms the authorization that their eavesdropping is legal are: the AG, the DAG, the AAG, and any principal prosecuting attorney, such as the State AG [corrected per LHP] USA ~~[Actually, maybe this means a State AG]~~.

Yet, as the report informs us, for a period of time (a period of time, I might add, at some remove from 9/11), **none** of those people had signed off on the wiretapping program. After the Deputy Attorney General, as the Acting Attorney General, refused to endorse the legality of the program, Alberto Gonzales authorized it.

The Committee can say, however, that beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence

activities that had been authorized by the President.

The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. **All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.** [my emphasis]

In other words, DiFi's amendment would introduce the very real possibility that the FISA Court would rule that the White House Counsel could not legally authorize the telecoms to wiretap, and that therefore the wiretapping that occurred immediately after March 10, 2004—precisely the time period when the AG and the Acting AG determined that the wiretapping was not legal—was not legal. DiFi's amendment was poison for Hatch because it threatens to hold the telecoms responsible for continuing the wiretap program during the period when the AG refused to authorize the program. And, of course, it therefore threatens to certify in a court that Bush's actions following the hospital confrontation were illegal. In other words, DiFi's amendment threatens to scuttle the real intent of the immunity provision, protecting Bush from any legal consequences for wiretapping

illegally.

Reid's Request for the Authorization Letters

Now consider the fact that Harry Reid made a belated attempt on Sunday to get Mike McConnell to turn over the authorization documentation for the warrantless wiretap program to all of the Senate.

Dear Admiral McConnell:

As you know, the Senate will begin debate on the FISA Amendments Act of 2007 this week. Among the issues the Senate will consider is whether to grant retroactive immunity to telecommunications companies that are alleged to have assisted the government in its warrantless wiretapping program. You recently wrote in the New York Times that immunity is one of the three most critical issues in this bill.

We appreciate that you have provided access to the documents necessary for evaluation of this issue to the Senate Intelligence and Judiciary Committees, as each has in turn considered it. As the debate now moves to the full Senate, I believe it is of critical importance that all Senators who will be called upon to vote on this important question have an opportunity to review these key documents themselves so that they may draw their own conclusions. In my view, each sitting Senator has a constitutional right of access to these documents before voting on this matter.

I strongly urge you to make the documents previously provided to the Intelligence and Judiciary Committee regarding retroactive immunity available in a secure location to any Senator who wishes to review them during the floor debate.

Who knows whether, faced with a rejection from Congress, McConnell is going to be more willing to share those authorizations than he has been up to this point. But if he is, then the Senate will know what SSCI already knows—and already told us. The warrantless wiretap program operated outside the plain text reading of the laws governing wiretapping, at least for the period following the hospital confrontation. If I can figure that out, then I suspect the FISA Court can figure that out.

Pulling the Bill

So how does this result in Harry Reid having to pull the bill? I'm not sure. But I suspect that, if he really believed that DiFi and all the other moderate Dems refused to pass a bill with immunity without FISA Court review (and presume that we might trade Specter for Lieberman to gain a majority). Reid may well be at the point where there are three factions in the Senate (No Immunity, FISA Review before Immunity, Bush Apologists), which would prevent a bill from ever passing.