

FISA LIVEBLOG

Reid is on the floor talking about what votes we'll have tomorrow:

Immunity
Substitution
Exclusivity

Argh. This means we won't have 60 there for exclusivity.

Reid and Mitch McConnell had some back and forth on the stimulus package.

Kit Bond:

Thank colleagues for agreeing to a way forward on this bill. Hehehe, it would do no good to pass a good that is good for politics, but does not do what those who protect our country need. With these fixes we'll have a bill the President will sign.

Shorter Kit: this is very very technical and so we've decided to just do away with Congressional review and, while we're at it, privacy. What Mike McConnell wants, Mike McConnell gets.

Whitehouse:

In this debate about revising FISA and cleaning up the damage done by the President's warrantless wiretap program, the Administration expends all its rhetorical focus on what we agree on.

On what terms will this Administration spy on Americans?

The privacy of Americans from government surveillance.

Both Chairmen—Leahy and Rockefeller—have given it their blessing.

As former AG and USA, I oversaw wiretaps, and I learned that with any electronic surveillance, information about Americans is intercepted incidentally.

In domestic law enforcement, clear ways to minimize information about Americans. **Prospect of judicial review is an important part of protecting Americans.** Bond and Rockefeller have already put into the bill that the authority to review the minimization if the target is an American inside the US. But as will often be the case, the target will often be outside the US. An American could just as easily be intercepted in these situations. This protection (review of minimization) should apply when the intercepted. It makes no sense to strip a court based on the identity of the target. It may be that if there's litigation that a court will decide that it is implied. The mere prospect of judicial review has a salutary effect. The opposite is true as well, when executive officials are ensured that a Court is forbidden to police enforcement, then they are more apt to ignore compliance. Both here, where the FISA bill creates an unheard of limit on Court powers, and in the immunity debate, where we intercede to choose winners and losers. Bad precedent for separation of powers. Those of you who are Federalist Society members should be concerned about this absence of separation of powers.

Quotes Scalia emphasizing the importance of separation of powers. [nice touch, Sheldon!]

Schumer:

10, no wait make me modify to 12 minutes? I'll move it back to 10. Rise to speak about two issues. Something that happened in Arizona yesterday. Blah blah blah blah some team named the Giants.

Chuck, I appreciate your support of Whitehouse's amendment, but can you gloat during morning business?

Chuck finally talking about minimization. Oversight. Ensure we get all the intelligence information we need without abuse or overstepping of bounds. It's hard to see how anyone could object to oversight after the fact to make sure that people aren't abusing the

privilege.

Jello-Jay Rockefeller:

Says they learned from SJC, strongly supporting explicitly stating that the Court can review compliance. "Without the compliance part of it are nice but meaningless."

[Good for Jello-Jay Rockefeller, all those emails and phone calls have made some difference]

Kit Bond

[Interesting moment. Bond says Hatch and "Mutual Protection Racket" Sessions want to speak, but they're not IN DC. Whitehouse asks when they'll be in, and Bond says I don't have their flight schedule, and cuts Whitehouse off.]

Damage done by Protect America Act. No one said there was damage done.

Bond blabbing on about how the FISC is not able to assess compliance with minimization procedures. [In spite of the fact that these are all circuit judges who review this kind of stuff every day.]

Shorter Kit: I think Sheldon Whitehouse should be in charge of assessing compliance rather than the Courts.

Feingold

PAA authorized new sweeping intrusions into Americans' privacy. Feingold/Webb/Tester. This is about whether Americans at home deserve more protection than people overseas.

This bill permits the government to acquire those foreigners' communications with Americans. There is no requirement that the targets be terrorists, spies, or even agent of foreign power. This allows them to acquire anything pertaining to foreign affairs of the United States. Many law-abiding Americans will be swept up in this new form of surveillance with no judicial oversight.

Brings up one of the declassified (by EFF) letters in which McConnell said PAA would authorize the collection of communications of foreign businesses.

Where govt knows in advance, govt can acquire those communications with an American involving terrorism etc., and anything else with a court order. Govt can continue to collect foreign to foreign. If govt does not know with whom a foreign target is communicating, can acquire. But once the govt recognizes that one end is in the US. It must then segregate the US communication in a separate database. Does something similar with PAA. Can disseminate any of them if it pertains to terrorism. Notify after the fact.

These provisions ensure that we know when Americans' communications are being collected so we can track the impact on Americans' privacy. And yes, this is good for national security. We've heard the President say, that if there are people in this country communicating with Al Qaeda, we need to know about it. This sets up a means to do so.

This amendment permits wiretapping overseas. If tracking AQ, it can collect all of it. It needs to tag the information, notify FISA after the fact. If the govt is conduct massive dragnet collections, this would provide the proper oversight. **It will make sure that these authorities are not abused.**

Minimization procedures. Extremely important. But the supporters of Intell committee bill are enough to protect privacy. Minimization requirements are quite weak. Permit widespread dissemination of information about US person and their identities if necessary to understand foreign intelligence. **We know from our experience of nomination of John Bolton how easy it is to get the identities of people obtained in intelligence.** Minimization is simply inadequate in context of broad new authorities. Amendment balanced and reasonable approach. It gives the govt full access to foreign to foreign

without court oversight. Access to foreign to American if terrorist without court order. Gives the administration what it asked for. So when VP says, we need to pass leg that permits wiretapping of foreign to foreign. This amendment totally permits that. This amendment also provides safeguards to make sure Americans' rights are being protected. Too many Americans are going to have their communications collected. Any Senator who believes Exec Branch should not be granted far reaching authorities without independent oversight, should vote for this bill.

Tester

[Last week, we tried to strategize with Tester to get him to wear his Carhart jacket on the Senate floor. But he's in a suit now.]

Sets a higher threshold for access to communications for those that involve Americans.

Why is this necessary? Because this Administration set up a warrantless wiretap program that severely infringed on our rights to be free from unwarranted search and seizure. This bill expands on the Administration's illegal program. As it stands, anytime you communicate overseas, your communication could end up in a govt database.

This is not what Americans expect or deserve.

Foreign Intelligence Surveillance Act is meant for foreign intelligence.

Webb

Got his first security clearance when I was 17. Black security clearances when Secty Navy. Also very sensitive to massive instantaneous flow of data that makes it essential to intercept key transitions. Gives us responsibility to ensure that with this volume that we don't allow mistakes and abuse. This amendment designed to allow our govt to aggressively fight terrorism but to protect our rights. Will not stop or slow ability of intelligence services to do the job

they have to do. Arguments have not focused fully about broad Constitutional issues.

[You're telling me.]

We also must care just as deeply that our govt surveillance is conducted in accordance with our Constitution.

Watchwords for this amendment: Safety, Security, Fighting Terrorism, Oversight, Proper Checks and Balances

Like to emphasize that our amendment will do what the American people have been demanding. Every American supports the fundamental principle of checks and balances.

For almost seven years, the executive branch's surveillance program has operated in secrecy, above the law, with no oversight. Only executive and some people from telecom companies have known which Americans were being wiretapped. Congress rejected this idea when it first passed FISA.

[Brings up denial of request to see documents pertaining to the program as it has existed]

If we do not ask the questions, how will we ever know the extent of govt surveillance?

Some argue this will be cumbersome. Not true—it already labels the info it collects.

Time to law aside differences, time to assert oversight activities.

Kit Bond

Quite a few misconceptions and misinterpretations.

[Can we charge him with perjury if he lies?]

A number of members who wish to speak more about it.

[Once again: Hatch and Sessions not here???

You can't get a certification to begin process unless reasonable process to be sure person

outside the States, do not permit intentional targeting of any person in the US. A significant purpose is to obtain foreign intelligence information. Statement that someone going abroad calling home would be beyond the pale. Clear provision against targeting American without being sure they're foreign intelligence.

The amendment will have a totally unexpected impact. It's difficult to explain in unclassified session why this is so unworkable.

[Shorter Bond: I don't want to admit they're playing in the servers with all your emails in them.]

[Bond is just being an asshole at this point, claiming an amendment that requires someone to figure out first whether a communication is overseas, when the amendment says you only have to segregate once you realize it is.]

I can't describe here, in a public setting, how they go about ascertaining what people to target.

[Bond doesn't want to admit that they data mine, which also has been outlawed by the Senate.]

Or his number 3 man after his last number 3 man was just wiped out.

[HAHAHAHAHA!!! Bond just recognized our biweekly capture of the number 3 guy of Al Qaeda.]

[Ut oh, mixing metaphors, Bond, the lockbox is how you stole our Social Security money.]

Cardin:

Cardin to present his sunset provision.

1978 Congress passed the FISA statute. Quoting Teddy from 1978. "The complexity of the problem must not be underestimated. ... My objective has been to reach some kind of fair balance..."

On sunset. Retroactive immunity concerns me, not just on how they worked with this administration. What concerns me is the impact

it will have on the court's oversighting the abuses of privacy by the Administration or private companies. We're saying, we reserve the right to take away the third branch of govt's right to decide whether someone's rights have been violated.

[Cardin finally gets around to explaining why 4 years instead of 6]

I think it is in our national interest for the next Administration to look at those opinions that came out of the AG's office and the White House, to see whether there is not a better way to accomplish surveillance and protection of civil liberties.

Oh Jeebus. Apparently the frigging Super Bowl is more important to TWO Senators than FISA is. Specter is introducing a bill to allow Churches to show NFL games on bigscreen teevee.

Jello-Jay Rockefeller:

Supporting Cardin's amendment. I think it's important, when you're doing legislation of this magnitude, when so many members are not informed as they should. It's not their fault.

This is really important legislation, but there is no one, with the exception of the Administration which has rejected the review. The reason for that is very clear, one wants to make sure one has the right balance. There are a number of new initiatives that will be started in this legislation. None of them are entirely predictable. There are the unintended consequences.

[Unintended, by you, perhaps, but certainly not unforeseen by us...]

Bond:

I have a number of my colleagues who have indicated a desire to speak on it, so I'm only going to speak a few minutes.

When this came to the committee ... bipartisan
bipartisan bipartisan ... the SSCI and Mike

McConnell get to make all the decisions.

The enemies, the terrorists who want to do us harm, they do not put a sunset on their activities. To put an artificial time limit on it makes no sense. Every time we explain on the floor, the more our enemies, those who would seek to do us harm, learn about our intelligence collection capabilities.

Cardin:

Let me just ~~kick Bond in the ass~~ respond to Bond's points. The cooperation we receive from the executive branch is very much enhanced when we know we have to pass a statute. I noticed Bond's point that the terrorists have no sunset. They also have no legislature. They have no respect for the civil liberties.

I think it is critically important that the next Administration work with this Congress to look at what this Administration did. That's why I believe the four year sunset is so important. We're not gonna let the authorities expire. There's not a person in this body that disagrees with giving the appropriate tools.

Cardin: Hey, did you know the NSA is in my state?

We owe the NSA the type of support that they need.

Feingold:

Part of judiciary bill. Again, this amendment puts no additional limits to target people overseas. To help ensure that the government follows the procedures that are laid out in the bill. The complete lack of any incentive to do what the bill tells it to do. One thing that everyone should agree, the govt should not use these authorities to target the conversations of individuals in the US. Bill requires targeting procedures designed to ensure that only people outside US are targeted. All of this sounds good. Targeting in particular are one of the few safeguards. Remarkably, the intell bill does

nothing to ensure that the govt follows them. They're basically non-binding. If the govt has been using those unlawful procedures while the FISC reviews them, they can keep using the information that it gathers, all the while disseminating information collected under procedures the court has found inadequate. It is simple common sense. If the govt wasn't allowed to collect this information they govt shouldn't be allowed to use this information except in emergency. This amendment adopts the same basic idea. If govt collects info using unlawful procedures, govt can only use information from US persons in case of emergency. Govt can still continue to use info collected on foreign persons.

Gives FISC discretion to use info on US person—info collected illegally—as long as govt fixes unlawful procedures. Overseen and applied by FISA court. Bare minimum we could do to ensure govt follows procedures it is required in the first place.

If they don't want that, then all the requirements are just suggestions, and it would be clear that they do not want to only spy on foreigners.

Bond:

Would impose additional operating burdens.

[Shorter Bond: I'm going to pretend this amendment applies to foreigners when it only applies to US persons, because otherwise I'll have to admit that we're willing to do sequestration for individuals but not for huge groups of people—because, you see, we want to data mine data mine data mine, but I'm not allowed to tell you about that. I'm going to filibuster for a bit in the hopes that Feingold doesn't kick my ass again because it hurt when he did it a while ago. And boy I wish Mutual Protection Racket Sessions were here already, because he's got an ass of steal and I'd rather he get his ass kicked by Feingold rather than me.]

~~Jello Jay Rockefeller~~ Jello Jay:

Feingold's amendment concerns the affects of the Court's determination that there are deficiencies in the govt's collection procedure.

FISC must review procedures for minimization and targeting. Requires that the shortcoming be fixed or the program be terminated. Feingold amendment prevents govt sharing or disseminating info already required under procedure that concerns US persons. There may be some appeal to idea that there are consequences. Looking at the consequences makes it clear that the provisions are impractical. Serious risks that we would lose valuable intelligence. Feingold's amendment prevents use of all info gathered through new system of intelligence gathering.

[Like Bond, I don't want to tell you that the problem with Feingold's amendment is that it does data mining and if we have to throw some out, it'd ruin our little data mining. If the govt collects thousands of targets inappropriately, I'd rather not get rid of those thousands of targets, Feingold thinks, golly, whether it is thousands or just one, if it was unlawful, it was unlawful.]

This would prohibit the intelligence community from using information just because of minor deficiencies in procedure.

[Note: Jello Jay just noted that he realizes this is leaving a record for the Courts. He is basically saying it is okay for the government to ignore minor "deficiencies" or even major ones.]

Feingold:

The arguments of Bond and Jello Jay don't apply here. My amendment only puts limits on info about US person. The govt can always use info about foreign targets. If the govt starts its program before court approval and fails to track what it has collected in the interim. It can do what it says it always does, which is to label

it. Result of the arguments is "we've set up rules for the govt and the govt doesn't follow the rules, there's not incentive. The govt can always use this info." I'm very troubled by the arguments of the Senator from Missouri. It is given an opportunity to fix it, the notion they shouldn't use this simply allows the govt the ability to spy on Americans with no consequences.

Jello Jay:

Thousands of targets, all foreign, means hundreds or thousands of pieces of intelligence. Intell doesn't come as one lump. All that intelligence could be lost under the Feingold amendment if there were only US person information that were involved.

Feingold:

It's true that these use limits would only apply to US persons.

Stabenow interrupts for the Stimulus Package arguments. I'm going to sign off now and go buy some food. Will pick it up if it gets interesting again.