

# FISA DEBATE LIVEBLOG

**Jello Jay on bulk collection** (time from opponents, this is a Feingold amendment).

Feingold argues amendment will prevent bulk collection by requiring govt to have some foreign intell interest in bulk info.

I believe will interfere with legitimate intelligence activities. I do not believe it provides additional protections. There important classified reasons underlying that concern.

Why it's unnecessary: Bulk collection would be unreasonable by Fourth Amendment. Bill provides that collections have to be in accordance with 4th Amendment. Minimization. Cannot primarily target a US person.

Feingold only requires that it certify that bulk intelligence has foreign intelligence interest. But it already requires that the collection is targeted at people outside of the US. Remedy does not improve upon protection in bill. I thus oppose.

## **Bond**

A number of inaccurate statements. It's not an understatement to say they could shut down our intelligence collection.

3979, Feingold and Webb.

Amendment says that FISA is supposed to be foreign to foreign. Focus on foreign to foreign is misplaced. We cannot tell if a foreign terrorist is going to be communicating with another terrorist in another country. It does no good to only collect foreign to foreign. Impossible burden that FISC judges told us shut down their review. [That's news, saying that it was the review of foreign to US that overwhelmed the FISC.]

This would stop collection. One intell professional said it would devastate the collection. Targetnet versus dragnet.

Blah blah blah; I'm going to misrepresent Feingold's bill, so I can rebut it.

[Wow. Just looked at the screen. Bond has a whole lot of lilac on. Perhaps he knows that way more people turned out last night in his state for Democrats than Republicans?]

I'm sure the FISC judges would appreciate the notion that they're doing a bad job. [wow that was dishonest]

### **Feingold**

Bond referred to our concerns about privacy being "tired accusations." I reject that characterization. I consider the notion that our amendment would prevent our ability to listen in on OBL—that's a tired accusation. He claims we wouldn't be able to listen in on that amendment.

This amendment does not require a FISC warrant to wiretap any foreigner overseas. This merely requires the govt label communications that have one end in the US for oversight. I don't know where Senator gets idea that somehow you can't listen in on conversation of OBL.

And I don't know why he says we're insulting FISC. We're just giving them the ability to do their job. Let's worry less about the alleged feelings of a secret court and worry more about the privacy of innocent Americans.

Use limit. Gives FISC option of limiting govt use of information that the FISC later finds is illegal.

Twice M and M said this would put use limits on foreign info. That's flat out false. There's nothing ambiguous about this language. Patently false claims—shows the lengths to which the opposition to this amendment will go to defeat this amendment.

Want to address objections that Chair made, that this could affect thousands of intelligence. Under amendment FISC can allow govt to use even info obtained by unlawful procedures if the govt fixes the unlawful procedures.

Even more important, we have to remember what these thousands of communications are. The only things the govt can't use is info collected through unlawful procedures. My amendment gives prohibition on US person collection some teeth. There ought to be a way to make sure this stuff happens, rather than let the Chair and Vice Chair says it has happened. Otherwise we're gambling on whether the Administration would choose to comply. I'm not willing to gamble on that.

[Boy howdy, it's purple day in the Senate.]

**Jello Jay (opposing reverse targeting)**

Feingold amendment goes too far. Problem is we are revising FISA because we want IC to have the capability to wiretap terrorists who call in the US. It is a significant purpose of this legislation.

[Jello Jay didn't get the memo about purple day. I guess that's because WV only gave votes to Huck yesterday.]

I'm going to keep blathering about how reverse targeting isn't reverse targeting.

**Feingold (reverse targeting)**

I think that most of my colleagues would agree that this bill should not open up a back door to get around FISA.

The MM letter, which mischaracterizes the amendment underscores why the issue is needed.

Reverse targeting IS NOT prohibited by the bill. It prohibits direct targeting.

If a foreign terrorist is talking to someone in the US, the IC should get a warrant. Without it, they'll never the full picture of what the American is doing or plotting. They're saying they don't want the communications of the domestic communications of a terrorist in the US. The letter seriously mischaracterizes the amendment. Does not affect ability to collect terrorists calling into the US. Only when a

significant purpose is to get info on a person within the US is the govt required to get a warrant. That is how the govt can most effectively protect us.

### **Bond**

Interesting that the proponent of this bill says the letter supports his amendment. Call attention to my colleagues, statement from civil liberties office, says concerns have been raised that PAA result in interceptions of US person communication.

### **Jeff "Mututal Protection Racket" Sessions**

Per his usual MO, Mutual Protection Racket is defending the Administration's use of water-boarding.

"Not a single prisoner has died in our custody."

[WRONG!!! At least two died from exposure, plus the guy beaten to death.]

Shorter Mutual Protection Racket: Don't say we torture, even though DNI admitted we did yesterday.

FISA is important.

Prevented attacks on "US saul." The people who spy on you "faul the law."

[Sessions is using a tactic that M-M did too—saying that because the SJC was voted down, then everything should be voted down, too. Apparently Specter is a Democrat now.]

[Ut oh. He just went off the ranch, and said the telecoms "helped" the govt—he's supposed to say they may have helped. Line, please! But he at least has his "retroactive liability" language down.]

[Ut oh, Mutual Protection Racket forgot that Bush wasn't duly elected.]

Lawsuits substituting fevered speculation and a fevered brow for fact. I don't know who they are.

[Mutual Protection Racket: George Soros funded Lancet's study of how many people died in Iraq, therefore it must be Soros who is funding the telecom lawsuits.]

Some say this amounts to amnesty. Amnesty is forgiveness for breaking the law, like forgiving people who broke the law by coming to this country. At no point during the telecom's actions were they illegal. For heavens sakes. Great Anglo-American tradition, that when called upon by law officer, a citizen not held liable if responding to officer, if officer was wrong.

[Two things. First, Alberto Gonzales, who approved of the request after the hospital meeting, was not then a law officer. Secondly, are you saying the officer, in this case, was wrong?]

#### **Saxby Chambliss**

On immunity.

Telecoms good faith effort, determined by AG to be lawful, w/exception of less than 60 day period when AGAG approved it.

I believe program necessary and lawful. This is not a review on President's program. Statement of importance of telecom assistance to our govt. There is too much at stake to strike Title II.

#### **KayBee Hutchison**

Talking up immunity—missed whether she's hipped to the liability protection thing or not.

#### **Jello Jay**

Far and away most contentious issue is immunity [I mean liability protection]. Three amendments will be offered that relate to this issue. Dodd/Feingold. Specter.

Approach to immunity. Critics say it's akin to Congressional endorsement of President's wiretapping program. I understand this. Secret surveillance program that would cause suspicion. But anger should not prevent us from addressing the real problems the President has created.

Companies that were once willing to help govt may be questioning that assistance.

Corporations, no names at present time, have to make money, govt comes to them, as they have in the past on much smaller issues, advice of AG, saying this is legal, NSA require that you cooperate. And they do. Well, of course, they cooperated, but that was some years ago. Not in this Senator's view. There is no difference between just after 9/11 and now, those who are plotting to do us harm. The fact that it has not happened in no way excuses the American sense of relaxation on the whole subject and therefore we don't need to do something to keep those people that collect an enormous amount of intelligence. If that were to stop, there would be an enormous amount of intell that would stop. It happens to be true. What is it that telecoms get from this? They get 40 lawsuits. Maybe they've been sued \$10 billion, maybe \$40 billion, I won't speculate on this at this time. They have no reward at all [well except for being paid to do it] they go ahead and they do it, shareholders get unhappy about it, it could be happening, who knows, at the present time, maybe they will be less willing to do this. Several have done that, several at the beginning have done that. Corporations are in business to help their country [!?!?], they're in business to make money, they're losing prestige, reputation, they have angry shareholders. People on my side of the aisle tend to be suspicious of corporations. They are losing they are being sued. It's costly. It takes away from their energy to carry out their other missions.

[Perhaps the scion of a multi-millionaire family is not the person who should be making this argument.]

We're not talking about people here, we're talking about servers, whatever you want to call them, that send Xes and Os, if that stops, we will be in a very sorry situation. I don't know how to say it better than that. If they have a reluctance to help the govt, in providing the little instruments, then they have a little side

action that goes to a particular agency. They have been told they're compelled to do it. And so they do start to do it. And they're paying one heck of a price for it. What price do we pay? Nothing, they're still doing it. What price might we pay, bc they are corporations. The price we would pay would be overwhelming.

Without true cooperation from these companies, the IC cannot collect the information it needs.

I'm not naive in these matters.

It is possible cases continue for years, this won't result in any new information about Bush's program. In meantime, poses serious risk to collection program. We're not about being Courts, about balancing civil liberties as best as we can.

Many argue that those who acted unlawfully should be held accountable. I totally agree. Companies that deliberately seek to evade privacy laws can and should be subject to civil suit. That is not the issue. The intelligence committee spent plenty of time looking over what happened over the last six years.

[Note, they wrote the immunity provision after only having reviewed the letters for 24 hours.]

**All activities authorized by President, and all but one (that was done by legal counsel) which stated that activities determined to be lawful by the Attorney General.**

[Note, if true, this is huge. Jello Jay just twice implied that BushCO LIED when it told the telecoms the program had been found to be legal after March 10, 2004.]

**Jello Jay**

3:05 Cardin Amendment, proceeding to vote.

**DiFi tries to call up exclusivity, 3919**

I voted for bill, indicated I had concerns, filed additional views. In Judiciary, the Judiciary filed amendment included wrt strengthening fact that FISA be exclusive means

of electronic surveillance.

Several co-sponsors. Jello Jay, Leahy, Whitehouse, Wyden, Snowe, Specter, [missed some]

Vice Chair approached her about a modification which would allow a time for Admin to operate outside of amendment.

[Bond wanted 45 days plus 45 more days]

Question is whether I would be able to modify my amendment to limit that time to 30 days, provide limits which our side could agree to, that has not been given to me, will rest my case on exclusivity. I'll have an opportunity, I hope, to argue it later.

I would like to get another amendment, UC to call up 3919, FISA Court review of immunity.

#### **Cardin**

[Didn't say anything he didn't already say yesterday.]

#### **Bond**

This bill, PAA, had a six month sunset only bc not able to bring complete bill to the floor. This is a bill that should establish a permanent operating authority. As part of the compromise that we reached in passing the bill, we agreed on 6-year sunset.

The committee will protect Americans' privacy, I promise.

You can see how long we had to fight to get this through.

#### **Rockefeller**

Would say to presiding officer that I find myself in disagreement with Vice Chairman, originally wanted 4, went to 6, bc of an accommodation. Wisdom on settling on 4, I urge adoption of amendment.

#### **Cardin**

Comments Bond made. Terrorists have no



restrictions. No courts, no Constitution, no civil liberties. That's what makes this nation the great nation it is. PATRIOT Act had a 4 year sunset, we've used sunsets that have been shorter.

### **Bond**

IC says we must have the certainty of 6 year sunset. Bipartisan blah blah blah.

### **Specter**

Introducing Specter/Whitehouse substitution bill, Levin and Cardin added as co-sponsors.

Substitute USG as defendant in suits.

Telecoms and high level intelligence. Substitution, accomplishes objective of continuation of getting this intelligence information and at same time protects constitutional rights. USG steps into shoes of telecom. Govt could not assert govtl immunity. Can assert state secrets. Vital that courts remain open. Congress totally ineffective on oversight and restraining exec authority. Courts have effectiveness to maintain balance. President has asserted authority under Article II to disregard statutes signed by President. Start by FISA, only way to wiretap with court order. President initiated wiretap program in violation of that statute.

President—let me say Exec Branch—violated National Security Act that requires House and Senate informed of matters like TSP. Chair and ranking member ought to be notified of program like that, I was surprised to read about it in newspaper. A long time, lot of pressure, really to get the confirmation of Hayden to notify intell committees. Courts have been effective.

Hamdan. President does not have blank check on WOT. Hamdi, due process includes meaningful opportunity to contest facts, this is America, balance maintained bc courts remain open. I believe it would be problem when courts remain only means of checking executive authority.

## **Whitehouse**

Haggis shown exceptional courtesy to me as junior member of SJC.

Critical balance bet freedom and security.

We are proposing a sensible middle path, protects essential equities. Choice to give immunity and take away plaintiff's case is not fair. Nothing yet suggests that this is not completely legitimate litigation. It is not fair to plaintiffs to take away their day in court. Huge separation of powers problem, intruding into ongoing litigation, taking away due process, without providing basis for judicial finding that the companies acted in good faith.

Whether they acted in good faith. Good faith determination. I hope we can all agree that if the companies did not operate in good faith. We should not be the judges of that. This is ongoing litigation. They have asserted they acted in good faith. We should not rely on one side's assertion. Most Senators have not read the letters.

**This body is literally incapable of making such a determination.**

Substituting for the govt. If the govt directed them to break the law, the real actor is the govt. This is analogous to principal-agent directive. Principal is liable for acts of agent. Simple solution, follows law, first in rules of civil procedure. No one has due process summarily taken away. This is, after all, the US of A. Carriers get a judgment in their favor. No one is forbidden to defend themselves in litigation. No intrusion by Congress, no separation of powers trespass, if they acted reasonably in good faith, govt is morally operative party.

Separation of powers. We go all the way back to why we set up the separation of powers.

Quotes Scalia, same quote as yesterday.

I urge my colleagues to consider sensible

matters, morally right way to go forward.

### **Jello Jay**

I will oppose this bill for a series of very good reasons.

### **Bond**

Time allowed us by the proponents. (Bond a jerk.)

Permits lawsuits to go forward against govt. (Great, govt has immunity.)

There was notification of this program to the Big Eight.

If Specter doesn't think Congress has been effective overseeing programs, he hasn't seen Jello Jay's committee.

A disaster for intelligence collection to have substitution.

[I wonder how Haggis is going to respond seeing that Bond is treating his amendment just as cynically and dishonestly as Feingold's?]