

FISA AND THE WARRANTLESS WIRETAP BRIEFINGS

As we await certain doom because the NSA has to rely on FISA to authorize any new warrantless wiretaps (though it can continue all the programs currently in place), I wanted to correct what appears to be a common mistake about the earlier warrantless wiretap program. I've seen a lot of people claim that all of Congress knew of the program, that the Gang of Eight got regular briefings about it, that Congress wants the telecoms to get immunity because leaders in Congress want immunity.

The reality—at least according to the published record of those briefed on Bush's warrantless wiretap program—is much more narrow. And as this fight moves into the House, it'd pay to have a clear understanding of who got briefed and how they claimed to have responded.

The Gang of Eight was not briefed regularly on the program

Kit Bond likes to claim that the Gang of Eight—the majority and minority leaders of both houses of Congress and the majority and minority leaders of both intelligence committees—were briefed on the program. That's a lie. In general, the Administration briefed the intelligence committee heads, but not the Majority and Minority leaders. The first time the entire Gang of Eight was briefed on the program was when, on March 10, 2004, the Administration tried to get them to authorize continuing the program even though Jim Comey said it was illegal. At the time, the following were members of the Gang of Eight:

- Denny Hastert
- Bill Frist
- Tom Daschle

- Nancy Pelosi
- Porter Goss
- Jane Harman
- Pat Roberts
- Jello Jay Rockefeller

After Harry Reid became Minority Leader of the Senate in 2005, he received a briefing on February 3, 2005—by himself, as did Crazy Pete Hoekstra when he became HPSCI Chair in September 2004. There was not any other briefing where the entire Gang of Eight got the same briefing. Though after Risen and Lichtblau exposed the program, Jello Jay received a briefing with the Republican half of the Gang of Eight, and then Reid, Pelosi, and Harman received a briefing (which Roberts also attended).

As Arlen “Scottish Haggis” Specter has pointed out, the Administration was in violation of the National Security Act when, with the exception of March 10, 2004, it limited its briefings to just the intelligence committee heads.

The entire Congress was not briefed on the program

Aside from those members who have, at one point, been members of the Gang of Eight (Harman no longer is, and Pelosi has had two roles in it), just three members of Congress got briefings on the program before Risen and Lichtblau revealed it. The day after the hospital confrontation, Tom DeLay got a briefing, probably so he could tell Cheney that even he could not force through a bill authorizing the illegal program.

And, December 1, 2001, Daniel Inouye and Ted Stevens—as the ranking members of the Defense Appropriations Subcommittee—got a briefing, presumably so they could authorize the NSA to pay the telecoms tons of money to wiretap Americans. (Bill Young and John Murtha got briefings in 2006, after the Administration started briefing more members of the intelligence committees presumably in response to the Risen-Lichtblau revelations.)

Tom DeLay is, thankfully, moot. But the Inouye briefing is interesting in that he was one of the sane Democrats who repeatedly voted with Republicans in support of trashing civil liberties and privacy.

Focus on Jello Jay, Harman, and Pelosi

Certainly, Jello Jay's example in the Senate is not cause for optimism. Jello Jay attended the March 10, 2004 briefing where the Administration proposed going forward without AG approval, tantamount to going forward illegally. Jello Jay claims he never affirmatively approved the program.

The record needs to be set clear that the Administration never afforded members briefed on the program an opportunity to either approve or disapprove the NSA program.

And Jello Jay warned Cheney that the program seemed to violate the ban on data mining—at precisely the time when the Senate was banning data mining. Jello Jay should know better than anyone that the Administration broke the law—and that the telecoms continued their cooperation at a point when they didn't have AG approval, thereby breaking the law.

Nevertheless, Jello Jay supported immunity. You might argue that Jello Jay was protecting himself—except that he left a clear paper trail of his opposition.

But thus far, the House is different. Jane Harman has shown interest in compromising in the past. But significantly, she was not among the 21 Blue Dogs who petitioned Pelosi to go with the SSCI bill just passed by the Senate. Harman has opposed immunity without full disclosure (note, since she's no longer in HPSCI, she hasn't seen the documents explaining the legal rationale for the program), and I think if we can keep Harman with the majority, it will keep a number of other Democrats who might cave to Republican pressure.

And as for Pelosi? She has stated clearly that she opposed the program going forward without AG approval; she opposed the program in its most illegal form.

Speaker Nancy Pelosi of California, who attended the 2004 White House meeting as House Democratic minority leader, said through a spokesman that she did not dispute that the majority of those present supported continuing the intelligence activity. But Ms. Pelosi said she dissented and supported Mr. Comey's objections at the meeting,

So like Jello Jay, Pelosi didn't exactly approve of the worst parts of this program. And, as Novak describes, with the support of an overwhelming majority of her caucus, Pelosi used her prerogatives to stall Bush's push for immunity.

For the moment, Pelosi can and is using her position to ensure we get a real compromise bill (and Harman's support may help keep Blue Dogs with the caucus). And it certainly helps that Silvestre Reyes is writing scathing letters chiding Bush for his fear-mongering.

This fight in the House is going to come down to the roughly 40-50 Congressmen who preferred to side with the Republicans/bow to fear. But so long as Pelosi supports the will of the rest of the caucus, we can win that fight.