

# THE COMMISSION ON WARRANTLESS WIRETAPPING AND FISA COMPROMISE

Apparently, while I've been on my Haggis and Beamish pilgrimage, Steny Hoyer has been busy brokering a compromise on FISA.

House Majority Leader Steny H. Hoyer (D-Md.) said Wednesday a FISA deal is "still in flux" but he described the latest developments as "promising" and said he hoped to have a solution soon.

[snip]

Sen. Kit Bond of Missouri, the top Republican on the Intelligence committee and one of the GOP's top negotiators on the issue, said he met with Hoyer to discuss the issue on Monday, but did not say a breakthrough had been achieved.

"This is still a ping-pong match," said Rep Jane Harman (D-Calif.), referring to the back and forth on the bill between the two chambers.

Harman said the latest developments signify "positive movement" on the bill and praised the job Hoyer has been doing on the issue.

Hoyer has been the strongest proponent of a compromise in the Democratic leadership and has worked hard to broker a deal on the issue. He often acts as an intermediary between liberal House Democrats unwilling to grant the telecom companies immunity and conservative Senate Republicans and the White House, both of whom will not accept any FISA bill without immunity.

Now, before I say what I'm about to say, let me reiterate that I believe we should not compromise. The telecoms broke the law when they accepted a letter authorizing the spying on Americans signed by the White House Counsel in lieu of the Attorney General in March 2004, and they should be held accountable for breaking the law.

That said, let me make some points about what basis for compromise Steny might be negotiating, and how such a compromise might be an avenue for transparency about the Administration's (as distinct from just the telecom's) lawbreaking with the illegal wiretap program.

Remember that Steny is not just the chief broker currently on FISA. He was also the chief broker on the House bill that passed on March 14. And that bill had one provision that seems to have been forgotten in recent discussions of compromise, but was clearly intended, even in March, to serve as the kernel of any future compromises: the call for a commission to investigate the illegal wiretap program.

Here's what the bill—as passed by the House—calls for:

SEC. 301. COMMISSION ON WARRANTLESS ELECTRONIC SURVEILLANCE ACTIVITIES.

(a) Establishment of Commission- There is established in the legislative branch a commission to be known as the 'Commission on Warrantless Electronic Surveillance Activities' (in this section referred to as the 'Commission').

(b) Duties of Commission-

(1) IN GENERAL- The Commission shall-

(A) ascertain, evaluate, and report upon the facts and circumstances relating to electronic surveillance activities conducted without a warrant between September 11, 2001 and January 17, 2007;

(B) **evaluate the lawfulness of such activities;**

(C) **examine all programs and activities relating to intelligence collection inside the United States or regarding United States persons that were in effect or operation on September 11, 2001, and all such programs and activities undertaken since that date, including the legal framework or justification for those activities; and**

(D) report to the President and Congress the findings and conclusions of the Commission and any recommendations the Commission considers appropriate.

(2) PROTECTION OF NATIONAL SECURITY- The Commission shall carry out the duties of the Commission under this section in a manner consistent with the need to protect national security.

(c) Composition of Commission-

(1) MEMBERS- The Commission shall be composed of 9 members, of whom-

(A) **5 members shall be appointed jointly by the majority leader of the Senate and the Speaker of the House of Representatives; and**

(B) 4 members shall be appointed jointly by the minority leader of the Senate and the minority leader of the House of Representatives.

(2) QUALIFICATIONS- It is the sense of Congress that individuals appointed to the Commission should be prominent United States citizens with significant depth of experience in national security, Constitutional law, and civil liberties.

(3) CHAIR; VICE CHAIR-

(A) CHAIR- The Chair of the Commission

shall be jointly appointed by the majority leader of the Senate and the Speaker of the House of Representatives from among the members appointed under paragraph (1)(A).

(B) VICE CHAIR- The Vice Chair of the Commission shall be jointly appointed by the minority leader of the Senate and the minority leader of the House of Representatives from among the members appointed under paragraph (1)(B).

(4) DEADLINE FOR APPOINTMENT- All members of the Commission shall be appointed not later than 90 days after the date of the enactment of this Act.

(5) INITIAL MEETING- The Commission shall hold its first meeting and begin operations not later than 45 days after the date on which a majority of its members have been appointed.

(6) SUBSEQUENT MEETINGS- After its initial meeting, the Commission shall meet upon the call of the Chair.

(7) QUORUM- A majority of the members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(8) VACANCIES- Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(d) Powers of Commission-

(1) HEARINGS AND EVIDENCE- The Commission or, on the authority of the Chair, any subcommittee or member thereof may, for the purpose of carrying out this section, hold such hearings and sit and act at such times and places, take such testimony, receive such evidence, **and administer such oaths as**

the Commission, such designated subcommittee, or designated member may determine advisable.

(2) SUBPOENAS-

(A) ISSUANCE-

(i) IN GENERAL- The Commission may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence relating to any matter that the Commission is empowered to investigate under this section. The attendance of witnesses and the production of evidence may be required from any place within the United States at any designated place of hearing within the United States.

(ii) SIGNATURE- Subpoenas issued under this paragraph may be issued under the signature of the Chair of the Commission, the chair of any subcommittee created by a majority of the Commission, or any member designated by a majority of the Commission and may be served by any person designated by such Chair, subcommittee chair, or member.

(B) ENFORCEMENT-

(i) IN GENERAL- If a person refuses to obey a subpoena issued under subparagraph (A), the Commission may apply to a United States district court for an order requiring that person to appear before the Commission to give testimony, produce evidence, or both, relating to the matter under investigation. The application may be made within the judicial district where the hearing is conducted or where that person is found, resides, or transacts business. Any failure to obey the order of the court may be punished by the court as civil contempt.

(ii) JURISDICTION- In the case of contumacy or failure to obey a subpoena issued under subparagraph (A), the United States district court for the judicial district in which the subpoenaed person resides, is served, or may be found, or where the subpoena is returnable, may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt of that court.

(iii) ADDITIONAL ENFORCEMENT- In the case of the failure of a witness to comply with any subpoena or to testify when summoned under authority of this paragraph, the Commission, by majority vote, may certify a statement of fact attesting to such failure to the appropriate United States attorney, who shall bring the matter before the grand jury for its action, under the same statutory authority and procedures as if the United States attorney had received a certification under sections 102 through 104 of the Revised Statutes of the United States (2 U.S.C. 192 through 194).

(3) CONTRACTING- The Commission may, to such extent and in such amounts as are provided in appropriations Acts, enter into contracts to enable the Commission to discharge its duties under this section.

(4) INFORMATION FROM FEDERAL AGENCIES-

(A) IN GENERAL- The Commission is authorized to secure directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality of the Government documents, information, suggestions, estimates, and statistics

for the purposes of this section. Each department, bureau, agency, board, commission, office, independent establishment, or instrumentality shall furnish such documents, information, suggestions, estimates, and statistics directly to the Commission upon request made by the Chair, the chair of any subcommittee created by a majority of the Commission, or any member designated by a majority of the Commission.

[snip]

(f) Security Clearances for Commission Members and Staff-

(1) EXPEDITIOUS PROVISION OF CLEARANCES-  
**The appropriate Federal agencies or departments shall cooperate with the Commission in expeditiously providing to the Commission members and staff appropriate security clearances to the extent possible** pursuant to existing procedures and requirements, except that no person shall be provided with access to classified information under this section without the appropriate security clearances.

(2) ACCESS TO CLASSIFIED INFORMATION-  
All members of the Commission and commission staff, as authorized by the Chair or the designee of the Chair, who have obtained appropriate security clearances, shall have access to classified information related to the surveillance activities within the scope of the examination of the Commission and any other related classified information that the members of the Commission determine relevant to carrying out the duties of the Commission under this section.

(3) FACILITIES AND RESOURCES- The Director of National Intelligence shall provide the Commission with appropriate

space and technical facilities approved by the Commission.

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(i) Reports and Recommendations of Commission-

(1) INTERIM REPORTS- The Commission may submit to the President and Congress interim reports containing such findings, conclusions, and recommendations for corrective measures as have been agreed to by a majority of Commission members.

(2) FINAL REPORT- **Not later than one year after the date of its first meeting, the Commission, in consultation with appropriate representatives of the intelligence community, shall submit to the President and Congress a final report containing such information, analysis, findings, conclusions, and recommendations as have been agreed to by a majority of Commission members.**

(3) FORM- **The reports submitted under paragraphs (1) and (2) shall be submitted in unclassified form, but may include a classified annex.**

(4) RECOMMENDATIONS FOR DECLASSIFICATION- The Commission may make recommendations to the appropriate department or agency of the Federal Government regarding the declassification of documents or portions of documents.

Best as I can tell, here's what this provision calls for: a commission, which will have a majority of members picked by the majority (that is, Democratic) party, with the ability to investigate not just the illegal wiretap program, but also,

all programs and activities relating to intelligence collection inside the



United States or regarding United States persons that were in effect or operation on September 11, 2001, and all such programs and activities undertaken since that date, including the legal framework or justification for those activities

That is, not just the warrantless wiretap program, but the National Security Letters, CIFA, and anything else they've been doing. This commission is intended to be Church Committee II.

Furthermore, it includes several provisions designed to thwart Republican efforts to undermine it:

- The staffers get security clearances (so Bush can't refuse to give investigators security clearances, as he did with OPR at DOJ originally)
- The Committee can subpoena people—and it can enforce the subpoena either in the city where the hearing is intended to be held, where the person lives or conducts business
- The Committee has several means available to enforce subpoenas, both by contempt of court or referral to the US Attorney for the jurisdiction in question (with some flexibility on which jurisdiction you refer it to)
- The Committee must submit an

unclassified report (though  
a classified annex is  
permissible)

Now, this proposal is not perfect. I would include several more provisions. Most notably, I would make any immunity offered to telecoms contingent upon the formation of this commission, and the sworn, transcribed testimony of the first set of witnesses (which would include at least Bush, Cheney—testifying separately, Alberto Gonzales, Andy Card, Jim Comey, Jack Goldsmith, and David Addington). In addition, I'd put another set of requirements for the membership, ruling out those with a conflict (people like Jamie Gorelick, who not only served under Clinton when he was establishing some of the legal and technical framework for this program, but who has since gone on to lobby for the telecoms). In addition, I'd rule out Lee Hamilton, collaborationist extraordinaire and a close friend of Dick Cheney, by name; it is time to end Lee Hamilton's career as the happy bipartisan who repeatedly gets rolled on these committees. I'd also require that there be some carry-over from staffers who have seen some of these documents on either the intelligence or judiciary committees; having such carry-over on the 9/11 Commission prevented the Administration from burying information it otherwise would have.

But let's take the commission as currently described. Let's assume, for the sake of argument, that it would be included in any compromise bill. What would it mean?

First and foremost, it might mean calling Republicans' bluff. If this commission were included as is, I suspect BushCo might get awfully squirmy about whether their concern is—as they've been claiming for over a year—immunity. Or whether it is, in fact, saving Bush and Cheney's own ass. I suspect, in fact, that the Republicans would reject such a compromise (or at least Bush would). Which would mean we could pass an extension to PAA, and go

on to fix FISA under President Obama, with a much more heavily Democratic Congress.

But let's suppose they accept this commission as part of a compromise solution. What are the trade-offs?

If we continue as is, and if the plaintiffs in the suits get by the problems of standing and state secrets, then we might hold the telecoms accountable. I think that's increasingly likely in the al-Haramain case, but less likely in the others—and it would surely be reviewed by Scalia and his nutso friends first. If one of these cases goes to trial, we are likely to get confirmation of what we already know: that AT&T has splitters on its backbones so the government can access communications traffic directly, and that for the period immediately following March 10, 2004, the telecoms operated under an authorization signed by the White House Counsel rather than—as dictated by law—the Attorney General. But our discovery will be largely limited to what we already know. Anything else will be presented in camera, if the plaintiffs even get a meaningful review of it.

But if we get the commission, we have a shot at getting testimony on the record or—just as likely—pursuing contempt charges against Cheney, Addington, and Bush (after the time, it should be said, when Bush can pardon them). And some of the key players—for example, on CIFA—aren't muckety mucks like Cheney. They're contractors who have an interest in staying on the right side of the law.

The Church Committee was not, by itself, sufficient to punishing Nixon for his domestic spying. Though, in fact, impeachment wasn't enough either. And 30 years later, those who fought the legislation that came out of the Church Committee are still fighting it—they're the same people who would be subpoenaed by this Commission.

Still, for all that I don't want any compromise with the Republicans on FISA, I am wondering

whether this Commission is an active part of the discussions. And at the very least, I'd like to see Democrats talking about this commission as prominently as they're talking about FISA.