

FISA UPDATE (AND WHY IS JOHN BOEHNER CRYING AGAIN?)

The week starts off with Main Core, Glen Fine's much anticipated IG Report has been released, today is another state election (Kentucky) in the most hotly, and closely, contested primary that many of us can remember, and, now, the tragic and deflating news that Senator Ted Kennedy has a malignant brain tumor. Oh yeah, and an extended holiday weekend and Congressional recess is at hand in a couple of days. This type of situation can mean only one thing – FISA is bubbling back to the surface. Heck, the only thing missing from this equation is a terror alert; but then again, the week is still young.

First off, where we stand. The news is not all bad, but it sure isn't all good either. From the National Journal (subscription required-sorry):

House Majority Leader Hoyer had previously said he wanted to reach a compromise on FISA by the Memorial Day recess. GOP and Democratic aides cited several reasons why that has not happened. Late last week, Hoyer sent Senate Republicans a list of provisions that House Democrats want included in a final bill, aides said. Hoyer's proposal took Senate Republicans by surprise. A Republican aide called the proposal "a step backward."

Before Hoyer's proposal, Senate Republicans believed that only two main issues needed to be resolved, and that they were close to reaching an agreement on them with House Democrats. One issue dealt with having the secret FISA court determine if the telecom firms should be granted retroactive immunity from lawsuits for their role in the

administration's warrantless electronic surveillance activities since the Sept. 11, 2001, terrorist attacks. The second issue centered on allowing the FISA court to review the administration's procedures and certifications for surveillance operations. "We're basically there on those two," an aide said.

But Hoyer's proposal included other provisions, some of which had already been defeated during votes in the Senate, aides said. One provision, for example, would allow the FISA court to assess if the government is complying with so-called minimization procedures, which limit the amount of information collected and stored on Americans incidental to the surveillance target. Another provision contains language making FISA the exclusive means under which the government can conduct electronic surveillance.

The good news is that it appears that there is little chance that anything is going to be attempted before the Memorial Day recess. The other good news, and I will be very pleasantly surprised if it maintains truth, is that Hoyer is really pressing minimization and exclusivity. These are critical concepts above and beyond the retroactive immunity part that we standardly focus on, see Marcy's discussions, among others, here and here. These are important concerns, and Hoyer and his working crew are to be commended for keeping these concepts part of the bargain.

The bad news, however, is, as I have long feared, that the compromise involves allowing retroactive immunity, but submitting the determination on it to the jurisdiction of the FISA Court. And Pelosi is firmly on board for this:

She told several leading House liberals – including House Judiciary Chairman

John Conyers and Reps. Maxine Waters, D-Calif., and Barbara Lee, D-Calif., – in a closed-door meeting that included Blue Dogs that a compromise would likely be needed on the issue of granting immunity to the telecoms.

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Pelosi is said to have argued this was needed to get a guarantee that the regulation of electronic eavesdropping would be the exclusive purview of the FISA court. Leadership and Blue Dog sources said Pelosi has made it clear that exclusivity is the most important issue for her in negotiations heading forward.

There is no question but that minimization and exclusivity are critical elements going forward, and Pelosi is surely correct that they are more important on FISA itself going forward. But it is weak, shameless and traitorous leadership that is willing to sanction and ratify the most breathtakingly egregious and widespread lawbreaking and mass violation of the citizen's rights to privacy in the history of the Union in order to get it. Especially when they don't have to, and are doing so out of raw electoral political concerns. Let's face it, the status quo is more than functional for the next seven months until a new Congress and, hopefully, a new administration takes office. There is no reason in the world that the House should not do what they have recently done, pass a good bill and, if the Senate Republicans block it or Bush vetoes it, so be it; then tar and feather the Republicans for the act.

The FISC is too much of a rubber stamp for Administration requests, the whole application to, and determination by, the FISC would undoubtedly be done ex-parte and the whole thing classified and secret (thus protecting Administration duplicity). This is no way to go. And here is one more thing to chew on in this regard. In over 25 years of existence, the FISC

has outright denied a Government application a grand total of 4 times. In many of those 25 years, the FISC was more liberal and protective of privacy rights than it is now. And here is the clincher. By my estimation, two FISC Judges, James Carr and Nathaniel Gorton, had their terms expire last Sunday, and we have no idea who Chief Justice John Roberts is appointing to replace them. It is a pretty safe bet that it will be Bush compliant judges though, which certainly doesn't augur well for immunity determinations. Giving the FISC the authority to impose retroactive immunity is a very bad move and should be fought with every ounce of intensity we have mustered in the past on this subject.

As a parting shot, there is a bit of humorous irony of the John Boehner "Crying Lane" variety. Chris Frates at Politico has a timely article up today on the hypocrisy of the GOP's leading wailer:

When a federal judge ordered Rep. Jim McDermott to pay House Minority Leader John A. Boehner and his attorneys more than \$1 million in damages and legal fees for leaking an illegally taped phone call to the media, Boehner said he pursued the case because "no one – including members of Congress – is above the law."

Why, then, is the Ohio Republican trying to squash similar lawsuits against telecommunications companies who cooperated with the government in warrantless electronic surveillance, ask the attorneys behind the class action suits.

"Mr. Boehner is trying to kick millions of Americans out of court in a wiretapping case while collecting more than \$1 million in his own wiretapping case. It's the height of hypocrisy and seems to indicate that members of Congress are entitled to their day in

court but the average American is not," said Kevin Bankston, a senior staff attorney at the consumer rights nonprofit the Electronic Frontier Foundation.

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Bankston said he found it insulting that Boehner would attack the attorneys representing millions of Americans as money-grubbers while he and his attorneys were "lining their own pockets."

Boehner screams and cries to get immunity for Bush, Cheney and the telcos while denying citizens the very rights he brandishes like a peacock. Insulting money grubbers lining their own pockets indeed. Pretty much summarizes the whole Bush/Cheney regime. Nancy Pelosi and Steny Hoyer are wrong to permit these people to slip off the hook; let's make sure they know what we think of that.