

THE FISA FIX AND OBAMA'S PROFILE IN COURAGE LEADERSHIP MOMENT

Whether by design or random chance, there is so much information, on so many and diverse subjects, flooding the politically astute citizen currently that it is hard to keep track. It seems like we are drawn from one crisis and seminal issue to another with the passing of not every day, but with the passing of every hour. And yes, they are all pretty much that important; but there are some that portend not just how we do in our lives, but who we are and what we stand for in the first place. Chief among those is the question of whether we are a nation of men freelancing in the public trough of goodwill, or a nation of laws in which men operate within the rule of law and under the edicts and guidance of our founding fathers and the Constitution they bequeathed us.

One of these issues has been at the forefront of our conscience for nearly a year now; the issue of how to improve the Foreign Intelligence and Surveillance Act (FISA) for the future we face and how to address the criminal violations of FISA we have suffered in the past. How we resolve FISA will go a long way indeed in indicating whether we are a nation of admirable laws or, alternatively, of mere opportunistic men.

The three critical parts of FISA that are the subject of the heated and protracted fight over reform are exclusivity, minimization and retroactive immunity. Simply put, exclusivity refers to the relative degree in which the resulting FISA law will control this area of the law. The original FISA statute was designed to be the

...exclusive means by which electronic

surveillance ... and the interception of domestic wire, oral and electronic communications may be conducted.

As Marcy Wheeler has pointed out however, the Bush Administration performed a terminally disingenuous end run around the exclusivity mandate of FISA via one of John Yoo's made to order faux legal opinions. The exclusivity provisions must be made impervious to such sophistry and with sufficient teeth to insure future compliance by the executive branch.

Minimization is the word for the procedures the government uses to

remove and (eventually) delete any data from US persons collected incidentally in the course of surveilling someone overseas. If we could be guaranteed that minimization procedures are sound, then the whole debate over wiretapping would be easier because we could rest assured that if the NSA picked up anything on a US person it didn't have a warrant for, it had to destroy it. That would mean that Americans could trust that they would only be wiretapped with a warrant approved (eventually, anyway) by a judge.

We live in an ever complex society served by ever more sophisticated communication means and devices. Even when our government takes it's duties to protect the privacy and fundamental Constitutional rights of the citizenry seriously, which has certainly not been the case over the last seven plus years, it is impossible to not incidentally and accidentally collect up information that should not be so obtained. Getting minimization right means that the government will not wrongfully retain and/or use inappropriately obtained information and data.

Retroactive immunity is by far the most easily understood of the three concepts. The sole

question is whether or not approximately forty lawsuits, that have already been consolidated into one general whole in the Northern District of California, for the convenience and economic efficiency of all concerned, will be dismissed in order to cover up the misdeeds and crimes of the Bush Administration and the rich multinational phone companies that conspired with them, or whether they will be allowed to legally proceed so that we may all learn the truth about what has been done in our name and accountability therefore assigned. It is really, at the root, that simple; truth and accountability or craven coverup.

The desperate push on FISA by the Bush Administration, complicit and subservient Republican Congressional leaders, and their telco partners is about to explode onto the forefront again. You are already starting to see the advance seeding by proponents seeking to seed the public with fear and alarm that if we don't get on board with the whims and desires of the Bush Administration we will be exposed to terrorism and all die. In direct response, Professor Martin Lederman performs a beautiful technical dissection of this fraudulent scare tactic in full detail here.

No, the FISA fix is not about "listenin to al-Qaida to protect America from terrorists" as George Bush et al. would have you believe. We have been doing that, and are going to continue to do that; and there is no disagreement whatsoever on that point. Rather, how we resolve FISA is what the disagreement is about, and it is a glaring symbol of what we are, and are going to be, as a country. We are either a nation of laws that protects citizens and their right to seek redress for being wronged by their government and it's agents, or we are a nation of self serving men like George Bush and Dick Cheney that can, and do, get away with whatever illegal and immoral acts they desire.

Two men that have recognized that fact and stood resolutely and heroically from the outset are

Senators Chris Dodd and Russell Feingold. Today, they remind us of what leadership truly is by way of a joint letter to the Democratic Leadership currently controlling the shape of the FISA fix process coming to a head.

As you work to resolve differences between the House and Senate versions of the FISA Amendments Act of 2008, we urge you to include key protections to safeguard the privacy of law-abiding Americans, and not to include provisions that would grant retroactive immunity to companies that allegedly cooperated in the President's illegal warrantless wiretapping program.

With respect to immunity, we are particularly concerned about a proposal recently made by Senator Bond, and want to make clear that his proposal is just as unacceptable as the immunity provision in the Senate bill, which we vigorously opposed. As we understand it, the proposal would authorize secret proceedings in the Foreign Intelligence Surveillance Court to evaluate the companies' immunity claims, but the court's role would be limited to evaluating precisely the same question laid out in the Senate bill: whether a company received "a written request or directive from the Attorney General or the head of an element of the intelligence community ... indicating that the activity was authorized by the President and determined to be lawful."

...

In other words, under the Bond proposal, the result of the FISA Court's evaluation would be predetermined. Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the FISA Court would be required

to grant immunity. To agree to such a proposal would not represent a reasonable compromise.

As we have explained repeatedly in the past, existing law already immunizes telephone companies that respond in good faith to a government request, as long as that request meets certain clearly spelled-out statutory requirements. This carefully designed provision protects both the companies and the privacy of innocent Americans. It gives clear guidance to companies on what government requests it should comply with and what requests it should reject because the requirements of the law are not met. The courts should be permitted to apply this longstanding provision in the pending cases to determine whether the companies that allegedly participated in the program should be granted immunity.

Take a good look; read the whole letter. This is what real leadership looks like. If Pelosi, Hoyer, Reid, Rockefeller, and Reyes all had even half of the "right stuff" that Dodd and Feingold possess, we would not need to have this discussion. But, alas, they do not and, as a result, our collective backs are again against the wall on FISA. More, and higher leadership needs to occur.

Barack Obama has fought long, hard and well to win the chance and right to lead both the Democratic Party and the nation as a whole. It is time for him to so lead, and his leadership will make the difference in this fight if he is willing to take the mantle. I am not the first to call on Mr. Obama to step up to the plate. Last week, when the news first broke that HPSCI Chairman Reyes was indicating his, and his fellow Democratic House Leaders', willingness to ~~compromise~~ cave and pass the Bush/Cheney FISA dream, dday at Digby's Hullabaloo made a very eloquent plea:

I congratulate Barack Obama on his primary win and think he has the opportunity to bring forward meaningful change in America. In fact, he can start today. He can go to the well of the Senate and demand that the party he now leads not authorize new powers to spy on Americans and immunize corporations who broke the law with their illegal spying in the first place.

...

Barack Obama could put an end to this today if he wanted. He could tell his colleagues in the House and the Senate that they should not work so hard to codify into law what his opponent is calling for – the ability for an executive to secretly spy on Americans.

...

This really is identical to George Bush's position and now the Democrats in the House are signaling their willingness to go along with it. Obama positions himself as a new kind of Democrat who wants to change Washington and has a background as a Constitutional scholar. There is no other issue which both shows the rot of the Democratic leadership and their disinclination to enforce or even recognize the Constitution than this one.

Truer words were never spoken. The time is now Mr. Obama, and you are the man. Even the Kennedys have put Mr. Obama up as a John F. Kennedyesque figure. Well, it is time for a Profile In Courage. And not just by Mr. Obama, but by all of the Democratic Leadership. The cause is just; the time is now. Limber you fingers. Oil your fax machines. Let Mr. Obama know that when he leads on this critical issue that we will not only follow, but will have his back. This is who we are; this is what we stand for. Let him know. NOW!

UPDATE II: The ground is shifting already. From

The Hill:

Congressional Republicans are reviewing **a Democratic proposal** to break the logjam on electronic-surveillance legislation by allowing federal district courts to determine whether telephone companies seeking legal immunity received orders from the Bush administration to wiretap people's phones.

That differs from a plan that Republicans, with support from the White House, floated right before Memorial Day that would give that authority to the secret court that operates under the 1978 Foreign Intelligence Surveillance Act (FISA). **In both cases, the courts would not decide whether those orders constitute a violation of the law, according to people familiar with the language.** The plan was floated by House Majority Leader Steny Hoyer (D-Md.) and has the support of Sen. Jay Rockefeller (D-W.Va.), the chairman of the Intelligence Committee.

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"While several issues still remain, Sen. Bond believes he and Hoyer are making progress on crafting an ultimate compromise and remains hopeful that a bill to keep American families safe can be signed into law before the August expiration moves the intelligence community back to 1978," said Shana Marchio, communications director for Sen. Kit Bond (R-Mo.).

Rockefeller said he is "mildly optimistic" that the plan could yield agreement, and added that the status of negotiations is "getting pretty darn good." (Emphasis added)

The Democratic Leadership takes us for fools, and treats us accordingly. They have taken the

Republican/Bush-Cheney White House dream plan and substituted the words "District Court" for "FISA Court" and run it up the flag pole to see if we will salute. Even Jello Jay Rockefeller seems like he might realize that this is pitifully weak and lame and is just hoping the citizenry is stupid enough to acquiesce. Let me repost the applicable paragraph from Senators Dodd and Feingold that addresses this latest ruse, with the *only* changes necessary:

In other words, under the ~~Bond~~ Democratic Leadership's proposal, the result of the ~~FISA~~ District Court's evaluation would be predetermined. Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the ~~FISA~~ District Court would be required to grant immunity. To agree to such a proposal would not represent a reasonable compromise.

This willingness of the Democratic Leadership to belligerently betray the trust and best interests of their constituents, party and country is simply stunning. This is weak, shameless and traitorous leadership at it's craven worst.
(h/t MadDog)

UPDATE I: Sen. Obama Phone (202) 224-2854, FAX (202) 228-4260 Courtesy of Rosalind in comments.