

PATRIOT HEARING LIVEBLOG

You can watch here.

Nice. Leahy started by referencing Obama's statement to NCTC and references the Zazi and other arrests.

Leahy: We can't go into what was said in a highly classified briefing. Need for prompt action and tools they need. Our bill increases use of congressional and judicial oversight.[repeats for emphasis] We have done so without undermining operational effectiveness of counterterrorism tools. On the last point I don't think there would be any doubt following the highly classified briefing.

Oversight oversight oversight.

But no Fourth Amendment.

Leahy: On matters currently before Supreme Court we should move carefully.

Leahy's pretty determined to push this through without Feingold holding things up.

Sessions: What we don't all agree on is that the PATRIOT Act is not an overreach. Classified briefing. See if we can agree on language. Operation difficulties have been altered. Five amendments to address operational issues. One, on pen registers minimization. Remember, pen registers just pick up numbers, not content. [Uh, and names, and with email, probably subject lines.] Judicial review standards for NSL non-disclosure orders. "Judges should not have discretion" to refuse a non-disclosure order if govt meets the burden.

How nice that the ranking member of SJC wants to gut Article III of the Constitution.

LOL!! Sessions trying to eliminate library exception with "the Fourth Amendment."

Sessions, on pen registers, claims no content.

(Um, except for the subject lines of emails?)

DiFi: NYT wrote article about efforts to come together. Responds to problems found by courts—Doe v Mukasey—having to do with disclosure. On its face, limits to terrorists and spies makes sense. However, for reasons that get classified very quickly, would unacceptably affect terrorism cases. Najibullah (she can't pronounce) was case in point. I did not describe why. I asked Kris whether anything in this bill would obstruct any ongoing investigation. He said "I cannot say in public session." Briefing from head of NCTC. Both he and Kris said that new language solved trap and trace. Court very engaged. Not just perfunctory review.

BullSHIT!!! If the court can only review the FBI Agent's theory, then it becomes perfunctory.

DiFi: Dead wrong when it says the bill has excesses that contribute nothing to making Americans safer.

Kyl: Unfortunate that some of our deliberations have to be in classified setting. Regrettable that great newspaper like Times can't be privy to all those discussions.

(Talk to Lichtblau and Risen!!)

Kyl: Passionate speeches by Leahy, Feinstein, Franken in classified setting. Just wish NYT could have seen passionate speeches.

Here's the op-ed from NYT.

Leahy: What was very impressive was the people who were responding (in classified briefing).

Specter: Reasons for opposing proposed changes. Moved from requiring connection with foreign power. 2005, this committee reported unanimously. Core of bill required connection with foreign power. When that is taken away, guts structure of PATRIOT Act. Lone wolf, no connection to foreign power. Again, guts structure of PATRIOT. Roving wiretaps. Lack of specification. Whole point on probable cause for search and seizure. Probable cause and

specificity. Our committee ought to be more assertive as guardian of separation of powers. State secrets, just declare it.

Hatch: Taken steps backwards in 215, delayed notification searches. We're requiring terrorist investigators to jump through hoops we don't ask criminal investigators to jump through.

Feingold: Bill continues to head in wrong direction. Sessions' amendments just came up yesterday. Will reserve right to address issues on floor. Overall tone wrt what's happening to this leg. NYT absolutely right wrt its op-ed. Specter just pointed out, former chair of this committee, Lone Wolf has never been used. I don't think roving wiretap issue has been adequately resolved. NSL clearly hasn't been resolved. Particularly WRT 215. Issue that Feinstein addressed. Briefing yesterday. Feinstein as Chair of SSCI. Probably Senator has had most conversations, question is whether standard would have impeded investigation (Zazi). Issue before us is not theoretical change. We proposed to fix it, not let it expire. That's the problem with this whole discussion. Too much of info crucial to this debate is classified. Absolutely essential that this be declassified. Specter, different background and voice. In 2005 every single one of us voted for standard that Durbin offered. I've sat in intelligence committee since and listened for any reason why that standard couldn't protect this country.

Cardin: Thank you for bringing forward balanced bill. I was present at yesterday's briefing. Helpful, since I do not sit on SSCI. Practical aspects of pen registers, how disclosure issues work. Thank Sessions, these changes improve bill. Agree with Feingold: Standards that trigger use of these tools is our responsibility. Those in law enforcement want broadest authority. Most people will use that power—at least initially—in right way. But there are times that they're stressed, that they will go beyond what they should. NSLs were abused.

Important that we exercise independent judgment. My interpretation is that that does not impede national security. Yes, may change standard as far as thoroughness used by law enforcement. Should not delegate our authority as to these standards.

Whitehouse: Two quick points, in classified briefing heard from senior law enforcement and CTC programs, unanimously told us required these programs, Senators may have different views but in conflict with those administering these programs. A bit unfair to make comparison between law enforcement pen register, for reasons that are classified, we were briefed yesterday, many of us were aware beforehand. Where they are like law enforcement, no greater requirement bc terrorist investigation. Only in those areas that can't be discussed, there is this other standard. A bit unfair to suggest we're applying higher standards to CT investigations. Where they're not the same for good and classified reasons.

Leahy: All those who favor Sessions package. Ayes have it. (Sounds like Feingold and one other were the no's).

Durbin: Protect Constitutional rights on NSL. Only be issued some grounds to believe tie to terrorism or spy. Can get these records even when there is not tie to terrorism. Can lead to govt fishing expeditions. We've been told no reason to worry about broad grant of power. AGAG said librarians raising concerns were "hysterics." DOJ no time to monitor reading habits of Americans. Mukasey "paranoid fantasies." We now know FBI has issued NSLs for reading habits of innocent Americans. IG widespread abuses without reporting to IOB. Commend audits. W/o audits we still would not know about abuses. Clear abuses of rights of innocent Americans. FBI would have broad authority. But innocent Americans would enjoy protection. In this country, presumption on freedom of innocent Americans. Let me remind colleagues, Section 215 different from NSLs.

NSLs approved without judge. NOW INFORMED OF
WIDESPREAD ABUSE WHAT WILL DO ABOUT IT?
NOTHING?? I believe we can be safe and free.

Kyl: Two main points in response. First of all
significant IG criticism of FBI procedure has
nothing to do with connecting to foreign power.
Primarily having to do with exigent letter
problems. Secondly, now had extensive testimony
about the extensive efforts to correct
deficiencies. What are we to do about this?
We've been hearing about what FBI has been doing
about it. Right back in problem of beginning
investigation before having facts to prove
connected to foreign power. Really hard to do. A
lot of folks we have read about in media,
tenuous connections to foreign power.

Um, yeah, Zazi was off meeting with AQ, is that
not a connection???

Kyl: It should not matter whether we can connect
them to foreign power.

Fine—then we'll use these rules to go after
abortion clinic terrorists, okay, Kyl???

DiFi: I must oppose amendment. My belief that
this heightened standard render NSLs useless for
main purpose. Gather info at earliest stage of
investigation. Gather information to establish
whether someone is agent of foreign power. As
those of us that were present know, law
enforcement wanted lower standard. Must present
specific and articulable facts related to
investigation. They would prefer relevancy.
Durbin brings standard down lower. 9/11
happened. Everybody wondered why intell
community didn't know more. Not set up to ferret
out information.

Leahy: We're going to keep on doing oversight.
Will oppose Durbin's amendment. Throws burden on
every single member of this committee and every
single member of SSCI to do the oversight.

Feingold: Durbin tremendous ally on these
issues. Amendment insures NSL is used in focused
and effective manner. It was a significant

problem for Congress to grant government broad authorities and just cross its fingers. Kyl: Look, FBI cleaning it up, let's just leave it to them. IG Report indicated problems with ambiguity in statute as part of the problem. DiFi, if we do this render NSLs unusable. Only be true if one standard. These things can still be used even if pertains to someone in contact or relevant to activities of foreign power. DiFi says may be before you know. Without any standard at all you're looking at fishing expeditions. Exact standard wrt 215 all members of committee voted for in 2005. With NSLs no court review, even more compelling.

Sessions: Do believe Durbin misunderstands this amendment. Importance greater than how they are understood.

Cardin: Durbin maintains relevancy standard. Says you need to be able to point out this involves intl terrorism. Need that dot. If it's a domestic issue we have established principles and tools that should be used. Our constitution doesn't envision that FBI writes laws. Durbin amendment, make it clear there needs to be relevancy.

Klobuchar: Agree with you and Sessions. Point to actual language. Not pie in sky standard. (Says relevancy is in bill.)

Durbin: Want to make that point. Klobuchar just read my amendment. Standard that applies to those who activities and contacts of foreign agents. Listen to debate and wonder how people think Second Amendment rights so absolute. Clearly our right to privacy is not. Reasonable standards, standards will keep our nation safe, consistent with Constitution.

Kyl: Matter DiFi has spoken to to respond to Doe v. Mukasey in 2nd circuit. Utmost deference, substantial deference, in two different places, substantial weight. One of these kinds of terms is necessary, appropriate doesn't give guidance to fact-finder.

Cornyn: In previous lifetime was judge. Look at

amendment, wonder how judge would decide disputed case. Appropriate, not legal standard.

Leahy: I'm in 2nd circuit, paid a lot of attention to Doe language. I think that gives govt too much weight. Courts always weigh nat sec concerns of govt. Bill as we offered has language.

DiFi: I was one that had questions about appropriate. I had suggested substantial weight. Used in FOIA, state secrets. Legal value. In interest of bringing parties together will support substantial weight. I said FOIA, should have said FISA.

Hatch: If these amendments are accepted, I'm prepared to vote for this bill. Still have questions about bill.

Whitehouse: Share opinion of Kyl and Cornyn. For reasons we discussed at some length, support amendment. Point at which determination gets made, point at which classified investigation gets disclosed. Default is that ongoing investigation might be revealed.

Feingold: Standards on minimization, use FISA. Well-established concept. Last time, Congress mandated on feasibility of minimization. Nearly 4 years ago, have yet to receive results of inquiry. Its recs still have not been acted on. Waited too long. Set clear rules for how FBI handles massive amount of info it acquires through NSLs. Congress have access to minimization procedures.

Leahy: Read that report. Take same position with Dem Admin, should be hard deadline to produce what IG has asked for. Should have had procedures by now.

DiFi: Support amendment. Don't see anything that we should not do.

Sessions: On FBI program. Did find misuse, did not find abused fundamental standard. With personal attention of FBI Director we don't have to place any more burdens on what is basically

administrative subpoena.

Feingold; Not about standard. IG specified were inadequate.

Kyl: Very troubled about this amendment. Operational difficulties about minimization in this context as opposed to others. This idea is far enough out that I don't think we even asked FBI about this. We're going to have minimization for grand jury subpoenas next? Minimization ordinarily pertain to US citizens when deal with non-US citizens. How do you make sure protected. NSLs are going to relate substantially to US Citizens.

Thanks for clearing that up, Kyl.

Leahy: FBI is close to having procedures. I've been consistent in pushing to respond to IG's request. Saying same thing with Dem Admin. Asked to do by IG, now do it.

Feingold: I don't know of anyone thinks this is a problem. They're working on it. FBI director thinks we ought to do it, AG thinks we ought to do it.

Kyl: Register my objection.

Kyl: One more amendment, subsumed in what Feingold just did. Retain relevancy standard. Written statement of facts shall be retained by FBI.

Durbin: Those who said I went to o far, Kyl now wants to get rid of articulable facts. Why not just let them do what they want to do. People earlier said, that's our protection, now you're removing that protection!

Kyl: My amendment strikes specific and articulable. When you go to full investigation require specific and articulable.

Leahy: No court review. Should be thorough record.

Whitehouse: Logic for amendment is that statement of facts is what is customarily relied on for this kind of internal determination. The

concern is that by bringing in specific and articulable facts language, bringing in Terry Stop context. Subject to review under Fourth Amendment. Doesn't obtain court oversight. Inartful.

Sessions: When you issued subpoenas as USA, they didn't get court review.

Kyl: If in fact we're going to have minimization procedures I don't see any problem with this language.

Cardin: Review tools. Someone buys cleaning products that could be used to make explosive device.

Hey!! That was my suggestion.

Cardin: You don't want to use NSLs on everyone who buys cleaning supplies in the country. Relevant to investigation. Feinstein pointed out specific and articulable facts. Not going to be second guessed on getting information. Gives us oppty in oversight to make sure not using it for everyone buying cleaning supplies in country.

DiFi: listening to debate. These are given out by many thousand. Specific facts prior to certification. Kyl is right about art-kyoo-la-bull (problem saying that). Would you be amenable to dropping that? Specific is the issue.

Kyl: Good question.

Kyl: If we say that we want to know about Joe Blow buying hydrogen peroxide.

Whitehouse: Because specific and articulable comes from another context. Not trying to use Terry stop procedures. By getting rid of articulable, you get rid of that connection.

Kyl: If it is clear record of decision of this committee to unwind. Accept that change.

Leahy: Fully understand: you would change your amendment to strike and articulable, but keep specific.

Hatch: I have trouble with that. And I respect my colleagues, I really do.

Feingold: Concerned about role of judiciary. Any time FBI objects, we throw out language. Any time perspective of prosecutor introduced, we change language. We're not the prosecutor committee. We're the judiciary committee.

DiFi: It makes it harder to do a fishing expedition. A guarantee we owe the country.

That's awfully big of you, DiFi.

Kyl: Language would have to be modified slightly.

Feingold: Roll call please.

Feingold: FISA AA, ensures no bulk collection between overseas and US. Supported on floor by current president and vice president. Bulk collection would completely overwhelm already overburdened minimization. Bulk collection could be unreasonable under 4th Amendment. Nothing would prevent their communications from being retained. I would expect some of my colleagues to say we should trust govt. McConnell said it would be desirable.

Leahy: Not in process of reauthorizing FAA. Oppose now.

Feingold: Withdraw. Allow lone wolf to expire. Not part of PATRIOT Act.

Leahy: Willing to reauthorize it.

Passed 11-8. (Nos were Feingold, Specter, Durbin, and five Republicans—I think Sessions was one, not sure about others).