

PATRIOTS AND STATE SECRETS MARK-UP TWO

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Dan Lungren: NSL minimization. Deals with section of bill bc they did it on the Senate side. Strikes 2008 which calls for establishment of minimization procedures obtained pursuant to NSLs. If there are tangible problems that have arisen, let's create new procedures. Problem is we're trying to apply concept of minimization in NSL context. Can't use electronic surveillance and apply to NSLs. Square peg round hole. Not content of communication. Contrast to electronic surveillance. Generally note an expectation of privacy that a communication occurred, rather than communication itself. I'm talking about entry in phonebook. We will have chaotic consequences. I know some don't like NSLs. Much like criminal cases where GJ subpoenas can be used for duration of investigation. Must be available to national security. It seems at least strange that we would have higher degree of proof higher bar dealing in terrorist context. Requirement of destruction of early building blocks will lead to more intrusive means. I think minimization inapplicable to NSLs. As far as I can find from anything we received from Admin, no support. Leahy received letter from DOJ. Found nothing that says Admin believes this is necessary.

[Since when do Congressmen refuse to legislate until the President tells them to? He's pretending he can't accept an amendment unless the President tells him to. Let's hope that stance carries over to health care.]

Conyers: I think your efforts are good faith. Procedures reasonably designed to minimize the acquisition and retention of non-publicly available info regarding unconsenting US persons. These minimization procedures ensuring that non-public info during nat sec investigations regarding innocent American

persons not disclosed by law enforcement. Privacy experts and DOJ acknowledged need for these types of guidelines. Not dreamed up by our distinguished colleagues. Managers amendment accounts more accurately for how it can be used. Only for minimization procedures reasonably designed in light of NSL. Directs AG to submit procedures to Congress. I'm hoping we can go along with refining minimization procedures that already exist.

Lungren: Realize DOJ refining procedures wrt NSL. Unaware of DOJ either suggestion or consideration of applying minimization reqts to NSLs as part of good faith effort to refine NSL.

Conyers: We've been working together. If I had a letter that would address this to your satisfaction. They know what we're doing and why we're doing it. We have not encountered any objection to what is embodied in manager's amendment.

Lungren: First I heard DOJ had not raised any objections. My understanding they thought this was an inappropriate transfer of process used in electronic realm to this.

Conyers: I've got an idea I'd like to present to you afterwards that would make you more comfortable.

Smith: Support this amendment. Minimization will only burden FBI with unnecessary procedural impediments. Oh, and we should have had a hearing.

Conyers: I have a page full of hearings that we have had. To you and perhaps others they were insufficient and I apologize for that. Btw we did not receive any notice of what your amendments were. I don't know what other amendments are coming.

Chaffetz: I appreciate you on the great pronunciation on my name. Strikes 204 that require govt to, in addition to NSL, document specific and articulable facts that pertains to foreign power or agent of foreign power. Allows

info to be sought not just if it pertains to agent of foreign power. A backdoor attempt to roll back standards for NSLs. Previously Congress did away with specific and articulable facts. Congress refused to return to that standard.

[Chaffetz was just playing dumb, claims he didn't know what happened before. All of a sudden he's lecturing about what has gone before.]

Chaffetz: How can we limit when we know it relates to agent of foreign power.

Nadler: Rise in opposition. We have sought to properly balance considerations of national security and personal liberty. NSL issued without any court. Should be held to a higher standard than 215 business records order. Have to be reasonable and articulable facts, to show grounds to believe relates to foreign power, or agent of foreign power, or pertains to indiv in contact with. If you cant' show it relates to a terrorist, you should not be getting this. Relevant to an investigation is a 215 order, which requires court approval. If you can't show that it is related to a terrorist, go to a court and at least get an order. So we provided for both those contingencies, in a way that is more protective of privacy. What this seeks to go back to is essentially the current law, which has led to many abuses.

Smith: Support this amendment. In 2001 and 2005 we specifically reject need to have specific and articulable facts. Nothing has changed.

Conyers: At least one IG report, talking about abuses with NSLs. I will put into record. It is what has changed that we have been able to document that has led us to write managers amendment in this way.

Issa: Majority may choose not to support amendment. Record keeping related. I certainly think we can find a way to sanction those who do not keep records. Justify, if not this amendment, where would be not curtail legitimate

use of, for example, a plot to put liquid homemade plots in Britain. Do we tie hands here to follow-up to see if there are similar activities? Would the Chair speak to base text still enabling appropriate use is that what you're doing we're going to cut off the tool.

Conyers: All we're doing is requiring they go to Court.

Issa: If then they should go to Court.

Nadler: I'm confused about what your question was. What I tried to say before is that we're establishing two standards. 215, to do that need to get court order. Higher standard to look at similar records w/o court order. I'm not saying requiring court order but with lower standard you would require court order.

Issa: I would yield to the guy who has actually headed up investigations, Lungren?

Lungren: Sloppy record keeping. If you look at IG report. They didn't find any evidence of mal-intent, every indication is that taht has changed.

[What about the time when FBI tried to do something improper with 215 and then did it with NSL instead, after Court had said not.]

Issa: We've had the change, old admin, to new admin, negating any reason for this amendment.

Conyers: You didn't intentionally intend to stir up ordinary...

Issa: I think he was saying I was replacement for Bob Barr. With ACLU and NRA, making it as good as it could be. Wanting to get back to what we voted out of this bill.

Nadler: Gentlmen from CA talking about record-keeping abuses. I'll give you a few. Documents including social security and DOB records irrelevant to investigation. University records from university. Full credit reports when full credit reports only in counter terrorism cases. In a couple of instances after FISA court denied

record based on First Amendment concerns, the FBI simply went around Court, circumventing Court's oversight, despite fact that NSLs subject to First Amendment cases. These are some of the things we're trying to get at. Need strong oversight. Craft bill to put appropriate limits while permitting necessary investigations.

Chaffetz (?): In those three examples.moved outside of the law, doesn't mean law was wrong.

Nadler: We disagree on that.

Issa (I think) blares into mike, Conyers chides him for it.

Schiff: Makes changes to Section 215. May be used to order any tangible thing. Should not be used lightly. Orders reviewed by FISA Court, presumptively relevant. Bill before Committee leaves before presumption, govt must show specific and articulable facts. Admin has expressed concern that this would impact intelligence activities. Remove specific and articulable facts, but no longer presumption. Require report to Congress in six months about better ways to collect.

[This would put this in line with the SJC, except that it instructs Admin to go find better way to collect this info]

Quigley: Discussions with DOJ?

Schiff: DOJ hasn't given definitive answer. The Amendment addresses concerns raised by Admin. Admin would be more inclined to support than the provisions that it amends.

Quigley: I'll support this amendment, do hope that the DOJ graces with their opinions on this. Critical decisions. I understand SJC already had markup without DOJ veiws. Need to let us know what their views are.

[Note Quigley asked about DOJ views, but Schiff answered that feedback came from Obama Administration]

Smith: Another reason we might have a hearing. Amendment an improvement.

Smith: How can we protect civil liberties when we don't know how civil liberties affects these intrusions?

Conyers: Schiff wrt business records that we strike specific and articulable fact standard replace with language reported on bipartisan basis in Senate. Doing what has been done in Senate. So what we're trying to do is direct govt submit to court statement relied upon by applicant that info sought is relevant to authorized anti-terrorism investigation. Eliminate presumption of relevance that is currently in the law. Not a matter of making it more complicated, being much more specific about it. Reason this enjoys bicameral support, we're eliminating presumption of relevance. Ask that it be specifically articulated. Submit report to House and Senate committees on ways that ongoing operations can enhance civil liberties, within six month period.

Schiff: Exactly right. In response to ranking member, not wanting to force govt to disclose facts in court, 215 orders approved by FISA. I would hope, and expect, that when it makes 215 requests, does make showing of why relevance. I would hope not relying on presumption. No jeopardy that it be disclosed.

Lungren: Amendment to amendment. Members will recall various briefings we have had. Centrality of this section of the law to various programs proven very successful in fight against terrorism. Difference between requiring specific and articulable versus using standard of relevance at this stage of program or programs or whatever we want to call them, if we revert back to specific and articulable, it would deny us many of the dots that we need to connect as we were told by 9/11 Commission. Gentleman's amendment retains relevant standard. Requires statement of facts relied upon. However, my amendment would strike lines 7 through 10, which is the section where he removes presumption that

goes in favor of whatever agency making application. What evidence is there that there has been any abuse. Why ought there not be a presumption? [his voice is rising] As has been expressed, concern that when remove presumption, telling the court that we want different standard. No evidence in hearings we had..

[WAit, you said you had no briefings or hearings? Now you remember hearings?]

Lungren: Limited by what we can say publicly. Find one example of an abuse. One of the key areas of the PATRIOT Act, why didn't you collect the dots bc of the way the law was written inability to access the kind of information we're talking about here. Gentleman said look, that should be higher standard, you have courts review it. FISA Cout has done an exceptional job. Why run the risk of changing the standard that may cause the court to change its analysis. If we're acting to tell them past practice is based on presumption.

That is the danger that we have here. We had a problem with 9/11, attempted to address it. Know of programs about which we've been briefed for which this works very well, running a risk of sending a message to the Court that we want something different than what you've approved in the past.

Conyers: What you're doing is striking specific and articulable facts and taking away presumptive relevance.

Schiff: We are removing specific and articulable and also removing presumption. Two things. Contrary to what my colleague said, we are not changing standard. By removing specific and articulable. Removing presumption. Standard remains the same, not going to presume that something is relevant. THeY should be showing relevance. WRT never been problem, I would beg to differ, it's not something we can or should discuss here, have had public hearings, I would not represent no probs with 215. Govt should not be asking if cannot show relevance. I dont'

think showing relevance would impede any program
that is ongoing.