

DIFI'S SECRET LAW

Steven Aftergood linked to this colloquy on the PATRIOT Act which reveals a lot about Ron Wyden and Mark Udall's efforts to force the government to admit how it's surveilling Americans. The colloquy basically puts not just the agreement, but the circumstances that went into the agreement, into the Congressional record.

After some Senatorial blathering (mostly Wyden and Udall talking about how swell DiFi is for making this agreement), DiFi starts the colloquy by describing a meeting the night before (that is, on Wednesday night) between her, Wyden, Udall, Jeff Merkley, and Sheldon Whitehouse.

Mrs. FEINSTEIN. Mr. President, I wish to thank both Senator Wyden and Senator Udall for their comments. We did have a meeting last night. We did discuss this thoroughly. The decision was that we would enter into this colloquy, so I will begin it, if I may.

These Senators and I, along with the junior Senator from Oregon, Mr. Merkley, the Senator from Colorado, Mr. Mark Udall, and the Senator from Rhode Island, Mr. Whitehouse met last night to discuss this amendment, the legal interpretation of the Foreign Intelligence Surveillance Act provisions and how these provisions are implemented.

Note the presence of Merkley and Whitehouse, which I'll return to.

DiFi then talks about how great the collection program in question is.

I very much appreciate the strong views Senator Wyden and Senator Udall have in this area, and I believe they are raising a serious and important point as to how exactly these authorities are

carried out. I believe we are also all in agreement that these are important counterterrorism authorities and have contributed to the security of our Nation.

At which point Wyden interrupts and basically says (still speaking in Senate blather, mind you), "um, no."

Mr. President, I have enormous respect for my special friend from California, the distinguished chairwoman of the Intelligence Committee. I have literally sat next to her for more than a decade. We agree on virtually all of these issues, but this is an area where we have had a difference of opinion.

Wyden and Udall basically both then repeat their warnings about how the government is doing something with PATRIOT not explicitly supported by the law. At which point DiFi pipes up to say, alright already, I've conceded you have a point but don't talk about this here! Talk about it in my secret committee!

Mrs. FEINSTEIN. Mr. President, if I may respond, I have agreed that these are important issues and that the Intelligence Committee, which is charged with carrying out oversight over the 16 various intelligence agencies of what is called the intelligence community, should be carried out forthrightly. I also believe the place to do it is in the Intelligence Committee itself.

At which point she lays out the terms of the agreement: the Senate Intelligence Committee will have a hearing on the secret law right after the Memorial Day break, and if the Committee agrees to make a fix, they will amend the Intelligence Authorization.

I have said to these distinguished

Senators that it would be my intention to call together a hearing as soon as we come back from the Memorial Day break with the intelligence community agencies, the senior policymakers, and the Department of Justice to make sure the committee is comfortable with the FISA programs and to make changes if changes are needed. We will do that.

So it would be my intention to have these hearings completed before the committee considers the fiscal year 2012 intelligence authorization bill so that any amendments to FISA can be considered at that time.

The fact is, we do not usually have amendments to the intelligence authorization bill, but I believe the majority leader will do his best to secure a future commitment if such is needed for a vote on any amendment. I have not agreed to support any amendment because at this stage it is hypothetical, and we need to look very deeply into what these Senators have said and pointed out last night with specificity and get the response to it from the intelligence committee, have both sides hear it, and then make a decision that is based not only on civil liberties but also on the necessity to keep our country safe. I believe we can do that.

Note DiFi's mention of "specificity," which I'll return to.

After DiFi finishes, Wyden pipes in to say that if the Intelligence Committee doesn't decide to make a fix, then Harry Reid has promised that Wyden and Udall can introduce their amendment on a different bill, one DiFi doesn't have control over.

Senator Udall and I have discussed this

issue with Senator Reid. Senator Reid indicated to the chairwoman and myself and Senator Udall that we would have an opportunity through these hearings—and, of course, any amendments to the bill would be discussed on the intelligence authorization legislation, which is a matter that obviously has to be classified—but if we were not satisfied, if we were not satisfied through that process, we would have the ability to offer an amendment such as our original one on the Senate floor.

Of course, the chairwoman would still retain full rights to oppose it, but we would make sure if this issue of secret law wasn't fixed and there wasn't an improved process to make more transparent and more open the interpretation of the law—not what are called sources and methods which are so important to protect our people—we would have an opportunity, if it wasn't corrected in the intelligence community, to come to the floor.

Senator Reid has just indicated to all of us that he would focus on giving us a vote if we believed it was needed on another bill—not the intelligence authorization—before September 30.

Udall then weighs in with some Senate blather thank yous that provide a few more details on the meeting.

I also wish to acknowledge the involvement of the Senator from New Mexico, who is presiding at this moment in time, and the Senator from Oregon, Mr. Merkley, and the Senator from Rhode Island, Mr. Whitehouse, who has been very involved in bringing this case to the attention of all of us.

The Senator from New Mexico, of course, is Udall's cousin Tom. Apparently you even have to use Senate blather for family members.

Wyden comes back, restates the terms of the agreement (SSCI hearing, possible amendment, but if not, then an amendment in the full Senate). As part of that, he twice thanks—more Senate blather—Merkley, including this note.

Again, our thanks to the chairwoman and all of my colleagues on the floor, including Senator Merkley, who is not a member of the committee and knows an incredible amount about it and certainly showed that last night in our discussions and was very helpful.

At which point Merkley makes this speech (plus some Senate blather).

It was William Pitt in England who commented that the wind and the rain can enter my house, but the King cannot.

It captured the spirit and understanding of the balance between personal privacy, personal freedoms, and issues of the Crown regarding maintenance of security. It was this foundation that came in for our fourth amendment of our Constitution that lays out clear standards for the protection of privacy and freedoms.

So as we have wrestled with the standard set out in the PATRIOT Act, a standard that says the government may have access to records that are relevant to an investigation—now, that term is, on its face, quite broad and expansive, quite a low standard, if you will. But what happens when it is interpreted out of the sight of this Chamber, out of the sight of the American people? That is the issue my colleague has raised, and it is a very important issue.

I applaud the chair of the Intelligence

Committee for laying out a process whereby we all can wrestle with this issue in an appropriate venue and have a path for amendments in the committee or possibly here on the floor of the Senate because I do think it is our constitutional responsibility to make sure the fourth amendment of the Constitution is protected, the privacy and freedoms of citizens are protected.

At which point DiFi officially declared the colloquy over.

So a couple of comments.

Make no mistake, not only did Wyden get this colloquy in the Senate record, but there appear to have been several threats hiding behind the Senate blather. DiFi has said she thinks the way to fix a secret law is to change it in a secret committee meeting. But Wyden et al have made it clear that if she doesn't agree to fix it in her secret committee meeting, he will try to do so on the Senate floor.

And consider the role of Merkley here. He was at the meeting on Wednesday night, the only person present who is not a member of the Intelligence Committee (and who therefore did not attend the February 2 briefing that got Wyden all fired up about this). In his presence, the concerns about the program were discussed with some "specificity" (per DiFi's description). As Wyden describes, Merkley was not only present at the meeting, but proved "he knows an incredible amount about" the problem. As part of the whole colloquy, Merkley suggests this problem is akin to letting the King enter your house, precisely what the Fourth Amendment was written to prevent.

This is a key part of the threat, I suspect. Unlike Wyden and Udall, who learned of this problem via classified briefings, Merkley appears to have figured it out on his own. Which means he can speak openly about it if there is a

full Senate debate about it.

Now that implicit threat may all get buried under Senate blather. But it appears the message to DiFi is that if she doesn't fix this secret law in her secret committee, then there will be a public discussion about whatever crazy interpretation she is helping the Administration hide.

All of which sort of makes you wonder when DiFi first got briefed about this? Did the Administration brief the Gang of Four about it some time before it briefed the full committee in February?

In any case, I'm particularly interested in Whitehouse's role in all of this. Partly, that's because he's increasingly the person other Senators (including, I believe, DiFi) look to for a read of what is acceptable or not. And Udall appears to suggest that Whitehouse had a key role in alerting him and Wyden to the problem. Yet he did not co-sponsor the legislation to fix the secret law.

So where is Whitehouse on the issue of this secret law?