

OBAMA REJECTS SENATE ADVICE AND CONSENT OVER THE GUY WHO DATA MINES OUR COMMUNICATIONS

The Administration has released a veto threat of the Intelligence Authorization that I'm going to deal with in reverse order.

The last objection argues that we can't require the head of the NSA—the agency that gets to collect and data mine virtually all of America's telecom metadata, as well as a lot of the actual content—face Senate confirmation because that person might not be confirmed.

Confirmation of Appointment of the Director of the National Security Agency: The Administration strongly objects to section 421, which would add a requirement that the person nominated for the position of Director of the National Security Agency be confirmed by the Senate. The Administration believes that if this provision were to become law, a critical national security position would likely remain unfilled for a significant period of time, adversely impacting the management and function of the National Security Agency.

Admittedly, Obama has had problems getting his nominees through Congress, partly because of Republican intransigence, partly because he hung out his most progressive nominees to dry, and partly because he hasn't gotten nominees in place.

But the solution for that is not to give up! The solution is turn Republican intransigence into a political liability. And there's no easier area to do that with than National Security. Indeed, the only National Security nominees I'm aware of who got held up (aside from Eric Holder until he

promised not to prosecute torture) were TSA nominees who supported TSA workers' right to organize; with them, Obama made no effort to accuse Republicans for exposing the country to danger over a political spat. And even James Clapper—about whom a number of Senators had concerns—got confirmed unanimously.

Then there's the Administration's objection to the requirement for records of diplomatic negotiations about detainees.

Submission of Information on Detainees Held at United States Naval Station, Guantanamo Bay, Cuba: The Administration strongly objects to sections 307 and 309, which would state that the DNI must provide the Intelligence Committees with each Department of State cable, memorandum, or report containing certain information relating to Guantanamo Bay detainees, as well as government-to-government assurances related to the transfer of those detainees. The Administration believes that such disclosure will have a significant adverse impact on the willingness of foreign partners, who often expressly request this information not be disseminated, to communicate frankly on these matters.

The cables and other documents at issue — originated and controlled by the Department of State, not the ODNI — contain deliberative commentary and sensitive diplomatic discussions and negotiations, including commitments made by foreign governments relating to the handling of transferred detainees. The Department of State has accordingly declined to produce these documents to Congress or to U.S. federal courts because of the need to protect diplomatic communications in conducting effective foreign relations. The Administration is concerned that these provisions may conflict with the Executive Branch's constitutional authority to control the disclosure of information when necessary

to preserve the Executive's ability to perform its constitutional responsibilities.

There's a deep, deep irony here. If this were Dick Cheney's Administration, he would have added a "besides, Congress leaks so much we can't let these sensitive materials circulate." Except the Executive Branch is here refusing to share with the legislative branch the kinds of cables that were leaked to WikiLeaks, largely because of the incompetence of the Executive Branch.

You see, the Executive Branch may have "constitutional authority to control the disclosure of information," but not, apparently, the basic competence to do so.

And so Congress can't know whether the US is letting detainees of certain nationalities—like, say, Saudi Arabia—be released because of diplomatic sensitivities. Congress can't know whether we release someone like David Hicks to help a political ally win an election. And Congress also can't know what is probably the greater sensitivity, whether and how the Executive Branch, and allies like the Saudis, believe they're flipping detainees to work as spies (often mistakenly).

I can see why such a requirement would elicit a veto threat.

But I think the real veto threat comes from stuff we're not allowed to know about.

The Administration looks forward to reviewing the updated classified annex accompanying H.R. 1892. In a letter from the Director of National Intelligence dated August 30, 2011, the Administration identified specific provisions in the Senate classified annex that also raised serious concerns. If H.R. 1892 is presented to the President and includes the issues of concern described below and includes, but does not adequately address, the specific provisions of the Senate classified annex, the President's senior advisors would recommend

a veto.

The fact that much of this veto threat pertains to stuff that is substantive and sensitive enough to appear in the classified annex suggests it might be a real issue (and note that the items to which the Administration objects are in the Senate annex, not the House one, so they're not something Michele Bachmann dreamt up to be cute). It is very rare that Administrations differ with Congress on such substantive issues (as opposed to, say, GAO review). Which suggests this may well be the really interesting source of the veto threat.