

SHELDON WHITEHOUSE CONFIRMS FISA AMENDMENTS ACT PERMITS UNWARRANTED ACCESS TO US PERSON CONTENT

In the Senate Judiciary Committee's markup of the FISA Amendments Act, Mike Lee, Dick Durbin, and Chris Chris Coons just tried, unsuccessfully, to require the government to get a warrant before it searched US person communications collected via the targeting of non-US person under the FISA Amendments Act. It was, as Dianne Feinstein said, not dissimilar from an amendment Ron Wyden and Mark Udall had tried to pass when FAA was marked up before the Senate Intelligence Committee.

The debate revealed new confirmation that the government is wiretapping American citizens in the guise of foreign surveillance.

DiFi argued that the amendment would have impeded the government to pursue Nidal Hassan by delaying the time when they could have reviewed his communication (presumably with Anwar al-Awlaki). Of course, the amendment included an emergency provision that would have permitted such a search after the effect.

More telling, though, was Whitehouse's response. He referred back to his time using warrants as a US Attorney, and said that requiring a warrant to access the US person communication would "kill this program," and that to think warrants "fundamentally misapprehends the way in which this program operates."

Now, I'd be more sympathetic to Whitehouse here if, back when this bill was originally argued, his amendments requiring FISC oversight of minimization after the fact had passed. They

didn't. To make things worse, though Leahy repeatedly talked about Inspector General reporting overdue on this program, Congress is not going to wait for these reports before they extend the program for another three years, at least. So Whitehouse's assurances that we can trust minimization to protect US person privacy seems badly misplaced.

In any case, this represents an admission, as strong as any we've seen, that this program is entirely about collecting the US person communication of those who communicate with people (DiFi used the term "person of interest," which I had not heard before) overseas.

Update: Updated to explain this came in a markup hearing. Thanks to Peterr for pointing out my oversight on that point.