PROSECUTION TANKS IN TOOBZ STEVENS TRIAL

Ted Stevens has been sitting in the courtroom of Judge Emmet Sullivan in the E. Barrett Prettyman Federal Courthouse in DC since jury selection began on September 22. This morning the excrement hit the fan. Big time. Stevens' attorney, Brendan Sullivan, has moved for dismissal of the charges against Stevens, and he just may get it. The prosecution has screwed the pooch in a fundamental and intentional way.

From a wire report off of Reuters filed an hour ago:

> Lawyers for Republican U.S. Sen. Ted Stevens of Alaska urged a judge Thursday to dismiss the corruption case against him because they said prosecutors had withheld evidence helpful to their defense.
>
> U.S. Justice Department prosecutor Brenda Morris admitted a mistake had been made, but asked the judge to allow the trial to go forward. "We are human and we made an error," she said. "It was a mistake."
>
> The information involved an interview by an FBI agent with Bill Allen, the prosecution's star witness. In the interview, Allen said he believed Stevens and his wife would have paid for the renovations to their home in Alaska if Allen had sent them a bill.
>
> Prosecutors had notified the defense about the information only late Wednesday, after Allen had completed his second day of testimony.
>
> Stevens's attorney Brendan Sullivan asked the judge to dismiss the indictment. "It goes to the core of the defense," he said.

> U.S. District Judge Emmet Sullivan did not immediately rule on the request to throw out the case, but he clearly was angered by the mistake, calling it "unbelievable" and "very troubling." (emphasis added)

This is really bad. Blatant intentional withholding by the prosecution of exculpatory evidence. And it is evidence that bores straight into the heart of Stevens' not guilty defense. The defense did not learn of the existence of this until long after Allen took the stand. The directly and materially exculpatory to Stevens. There is no way to argue that Stevens' attorney would not have conducted his examination of all witnesses to date, much less Bill Allen, differently with knowledge of this in the government's evidence set.

Here is the clincher.

> The new evidence involved an interview that had been turned over to the defense, but the key part of what Allen said — that the couple would pay if they had been sent a bill — had been blacked out.

How do you not view this as intentional and malicious conduct by the prosecution? The key exculpatory portion of the witness statement, of the most important and star prosecution witness, Bill Allen, owner of VECO, blacked out and hidden from the defense? Please. That is intentional and flagrant.

When you hear legal types discussing "Brady material" or "Brady evidence", this is exactly what they are describing. Under the seminal case of *Brady v. Maryland* (maybe we should ask Sarah Palin) the prosecution must disclose to the defendant any exculpatory evidence they possess. Failure to so disclose can result in the dismissal of a case.

The situation in Stevens' case is awfully

blatant and clearly exculpatory. It should result in at least a mistrial; if I were the judge I would bounce the entire indictment with prejudice. If a defendant can't obtain relief on this fact set, then the theory in *Brady v. Maryland* has no meaning. Those judges in DC must be ready to explode over what this justice department has done over the last 8 years. The prosecution is in for a reaming of some sort either this afternoon or tomorrow morning. Stay tuned.

UPDATE: McClatchy has some additional information up:

> The lead Justice Department prosecutor, Brenda Morris, equally angry, had this response: "He's getting a fair trial, believe me. You're getting a great fair trial."
>
> Infuriated, U.S. District Judge Emmet Sullivan said he found it "unbelievable."
>
> "It strikes me this is probably intentional," the judge said. "This is the government's chief witness!"
>
> …
>
> Judge Sullivan sent the jurors home for the day. He'll hold a hearing later Thursday afternoon to determine whether to dismiss the case.
>
> "Maybe they'll come back tomorrow for further service, maybe they won't," he said.
>
> Even if it wasn't intentional, he told prosecutors, it was "gross negligence on the part of the government."
>
> He bristled at the prosecution's characterization that it was "lucky" that Allen was still on the stand and had yet to finish his testimony for the government, let alone be cross-examined by Stevens' attorneys.

> "It shouldn’t have to be lucky to get the government to do its job," Sullivan said. "The fair administration of justice doesn’t depend on the luck of the draw, a lucky day or a lucky continuance."

The judge is right, this is very offensive conduct from a due process standpoint. The withheld evidence goes directly, and I mean directly, to the element of intent. The prosecution argues that it is harmless error because they have adduced testimony that Stevens requested bills (actually additional bills, because it is established that Stevens paid a substantial sum, just not enough to allegedly cover all the work), but that Allen didn’t forward them. However, the blacked out (redacted) portion of their disclosure directly and unequivocally states that Allen believes that Stevens would have paid if he had been billed further. This mitigates intent as to Stevens and belief in existence of a crime on the part of the key prosecution witness, Allen.

There is some salvation in that Allen has not been cross-examined yet; but if the defense can show how they would have done things with the opening statement and examination of other witnesses sufficiently differently, they have a heck of an argument.

If I were Stevens’ attorney, I would already have had the junior members of my team combing the daily express court transcripts for instances in the opening statement, and with every witness that has been on the stand to date, as to how I might have argued and examined differently; specifically with an eye to how the theory of defense itself may have been altered. Might even go back into motions if there is any ground there to plow there.

If the prosecution argues that it is explained by mistake because Stevens demanded a quick trial, I would jam that up their rear. Exercise of Constitutional speedy trial rights does not

mitigate due process guarantees and they ought to be humiliated in so arguing. Did they say they were not ready for trial because they needed more time to comply? No. By arguing that nonsense, the prosecution only looks worse.

It will be fascinating to see what remedy for the prosecutorial misconduct Judge Sullivan imposes. And, as Christy noted earlier, there has been other misconduct that the judge already was not happy about.

THE BATES DECISION: A QUESTION UNASKED AND UNANSWERED

First off, a *mea culpa*. I was one of the first and strongest saying that Judge Bates would opt to just punt the contempt controversy back into Congress's lap. I didn't necessarily believe that he would hand a victory to the Bushies, but I did think he would, for the most part, take a pass by claiming it was not really a question for the courts and that Congress had alternative remedies available, that had not yet been exhausted, thus the issue not appropriate for consideration at this time (In fact, Bates noted on page 70 of the opinion that he would have been on solid ground doing just that).

I was wrong.

The Bush/Cheney unitary executive cult got their rear ends handed to them. Again. How shocking. Or, you know, not. They are basically batting an 0-fer since Cheney took Scalia on the robber baron aristocrat jet set hunting trip and managed to get a decision allowing him to keep the nation's energy program secret from the nation.

But now, predictably, the dark hats of Miers,

Bolten and Bushco want to delay the effect of Judge Bates' ruling until the next of never on the appeal. However, as MadDog (good to have the dog back I might add) points out, the white hats of Conyers' House Judiciary Committee have a response to that.

> Plaintiff Committee on the Judiciary of the U.S. House of Representatives ("Committee") opposes Defendants' motion for a stay pending appeal on the following grounds:
>
> (1) Ms. Miers's claim of absolute immunity has no likelihood of success on appeal because it is baseless and contrary to Supreme Court precedent, and was thoroughly and irrefutably rejected by the Court;
>
> (2) the Court's non-final order of July 31, 2008 ("Order") is not appealable, and thus a stay needlessly would cause further harmful delay;
>
> (3) Defendants suffer no harm, let alone irreparable harm, from (a) appearing at a congressional hearing or (b) producing non-privileged documents and descriptions of the documents they seek to withhold on the basis of executive privilege;
>
> (4) the Committee will suffer considerable harm as a result of the Executive Branch's delaying tactics, which virtually assure that the Committee's investigation into the forced resignations in mid-Administration of nine United States Attorneys in 2006 ("Investigation") will not be completed until after the 110th Congress has concluded and the current Administration has left office in January 2009; and
>
> (5) a stay would undermine the public interest by hindering the Congress from developing, if necessary, any relevant

> legislative remedies designed to improve the effective and fair functioning of the Nation's criminal justice system.

This is a nicely done, pointed response to the transparently disingenuous delay tactics of the Bush Administration. In going through the decision and the latest arguments on the shape of the appellate process by the parties, I realize there is another facet to this equation that has been bugging me. Despite how good Bates' decision is, why did it not address the refusal by the DOJ to prosecute a duly constituted, and valid on it's face, contempt citation referred by the United States Congress?

Bates' decision has drawn nearly uniform praise from across the board (with the exception, of course, of the parties negatively affected by it and their sycophants) including on this blog. Martin Lederman is indicative:

> It is an extraordinarily thorough, scholarly and thoughtful opinion — surely one of the best opinions ever written on questions relating to executive/congressional disputes. It is also, IMHO, correct on the merits, of virtually all of the many legal questions it discusses. It is important not only for its holding on the immunity question, but also for its holding and analysis on congressional standing, and for its unequivocal rejection (pp. 39-41) of one of the Administration's principal arguments with respect to all of these privilege disputes in the U.S. Attorney matter…

I find it shocking to be writing these words, but I pretty much agree. However, there is one glaring issue that is not addressed in the decision that is critical to this greater discussion of power and privilege, and I predict that will prove unfortunate in the future. To wit, is it appropriate for the US Attorney, in

this case Jeffrey Taylor of the DC District, upon specific command of the Attorney General, in this case the ever obstructing Mike Mukasey, to refuse to prosecute a duly constituted and valid on it's face contempt citation referred by the United States Congress?

A whole lot of people, both expert and non, have already been asking "what happens next"? What happens when Miers, Bolten, Rove et al. either blow off their repeat summons, or give unprincipled refusals to answer proper examination by the Committee? Without a prior resolution of the propriety of the Mukasey/Taylor refusal to prosecute the properly referred contempt citation, they may well refuse again, thus creating further intractable delay. Future Administrations may try the same refusal. Bates was certainly aware of the Taylor/Mukasey refusal, it is cited numerous times in the decision (see, for instance, page 16 of the decision):

> On February 28, 2008, Speaker of the House Nancy Pelosi certified the Contempt Report to Jeffrey A. Taylor, U.S. Attorney for the District of Columbia. Id. ¶ 60. Pursuant to the terms of 2 U.S.C. §§ 192 and 194, Mr. Taylor was directed to present the contempt charges against Ms. Miers and Mr. Bolten to a grand jury. See 2 U.S.C. § 194. On that same day, Speaker Pelosi wrote to Attorney General Michael B. Mukasey. Pl.'s Stmt. of Facts ¶ 62. The Attorney General had previously indicated that he would not permit Mr. Taylor to bring the contempt citations before a grand jury, and Speaker Pelosi "urged him to reconsider his position." Id. The next day, however, the Attorney General responded that because Ms. Miers and Mr. Bolten were acting pursuant to the direct orders of the President, "the Department has determined that non-compliance . . . with the Judiciary Committee subpoenas did not constitute a

> crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."

However, Bates gave no indication of the court's opinion on this issue, much less rendering a determination. This was a question that should have been addressed in the Bates decision; why wasn't it?

Is this the big chink in the armor of the surprisingly cogent Bates decision we all expected? Not as much as you think. Bates certainly could have addressed the issue, even if any conclusion was discretionary dicta, and I believe he should have. The real shortcoming here, however, resides with the HJC complaint in this matter; the Committee didn't plead the issue. Sure would have been nice if they had; maybe the Judiciary Committee would see fit to explain why they did not.

LET THE SUN SHINE IN

~~Today~~ Tomorrow (per CHS) is a big day in the life of Firedoglake, the debut of the new, powerful and reader driven Oxdown Gazette. Oxdown will be run by Ari Rabin-Havt, formerly of Harry Reid's office, an immensely talented and committed progressive voice. But the real power behind Oxdown will be you, and all the other readers, who heed the call and step forward to lend their voice to the work ahead. You are the future; the time is now.

Fittingly, one of the first substantive contributors anteing up at Oxdown is none other than our own longtime Emptywheel and FDL regular, masaccio. Following the lead started by Marcy in her *The FISA Loss: Recommendations for*

the Future post, masaccio has taken the next step in formulating a progressive based action plan. He has done an excellent job identifying several key goals and discussing modalities for obtaining them, and the thoughts and suggestions previously made by many of you here at EW and FDL are an integral part of his discussion. Go read *What Should Obama Do For Us?* and make your own further suggestions as to what we can accomplish through, and obtain from, Barack Obama in return for our support and votes. Here is my suggestion.

I would like a full and definitive pledge to open and transparent government. When the Democratic leadership were campaigning to claim a majority in 2006, and after they seized that mandate in the election, there was a promise made to change the ways of Washington, specifically in Congress, and stop the secretion of legislation being proposed, stop secret manipulation in back rooms, and to insure that bills are available to the individual members of Congress and the public sufficiently ahead of time to allow intelligent analysis and informed review before voting on the floor.

But when it came to seminal landmark legislation fundamentally weakening and eroding the rights of, and guarantees made to, every citizen that are embedded in the Fourth Amendment, they reneged. When it came to the literal, and arguably unconstitutional, taking of vested monetary claims, by mass numbers of US citizens, being actively and affirmatively pursued in courts of law against co-conspirator telephone companies, the Democratically controlled House of Representatives reneged. Instead of living up to their promises, Nancy Pelosi, Harry Reid, Steny Hoyer, and a cast of cronies saw fit to do an about face and operate covertly and clandestinely out of sight, in the shadows, concealing their craven machinations not only from the public, but the vast majority of their fellow Congressmembers too, before coercing a hasty and ill informed vote. The citizens of the United States deserve better treatment and more

respect from their elected representatives.

Mr. Obama needs to make a vow to change this pattern and practice for the sunlit better once and for all. Then he needs to convince us why we should believe he is not being patently duplicitous, like Nancy Pelosi, Harry Reid and Steny Hoyer were the last time Democrats sought more power from us. Mr. Obama, let the sun shine in.

THE FISA SHAFT IS UNDERWAY

As you know, the FISA Amendments Act has been being negotiated behind closed doors by Steny Hoyer, Kit Bond and friends for some time now. See here and here. Well, the action is coming a little faster than we all anticipated.

It now appears quite clear that either the House will vote on the War Funding Supplemental and then go to the FISA Amendments ACT or, and it is not clear at this time what the odds on this are, link the two bills and vote on both at the same time. Here is what we do know. House has finalized their war supplemental bill, and it appears to be a go for a vote tomorrow (Thursday). So, the best evidence is that the vote on FISA will be on Friday June 20, and may be as early as Thursday night. There is precious little time left to make our voices heard.

Here is what Liz Rose from the ACLU gave me for publication:

> One thing bugging me is that we do not have the Hoyer draft and neither do reporters; and yet some reporters are believing every single word Hoyer says. Feingold, Leahy, Conyers do not have the draft; the only people who do have it are Rockefeller, Bond, and Hoyer. People

> who are for the proposal. And yet I have not yet heard anyone question why that is. No sunshine and no one demanding to see the details.
>
> Plus, even if leadership will vote with us, and act like they are on our side, the truth is they control the calendar. Nothing happens unless they want it to. It is so cynical and calculating. And it seems that the unwritten story is that this whole FISA cave in is really all about the DCCC and their worries about freshmen dems getting re-elected. They are not afraid of terrorists – they are afraid of ads about terrorists. If they were really afraid of terrorists they would just extend the orders. But all they really want is to reward the big telco contributors and get more checks for their campaign coffers. It is all political.
>
> But I think they are wrong. Fear mongering did not help Guiliani win. And remember how good the House Dems were when they stood up on FISA and said no to the senate bill?. I will keep you up to date. Thanks. Liz

She is right. We, and more importantly, the Constitution, are being sold out for rank political posturing. Pitiful state of affairs that.

Here is the latest scheduling information from the House I can find.

> Subject: House Approps 2008
> TRACK BILLS: House Approps 2008
> Draft Bill – Fiscal 2008 War Supplemental Appropriations (House)
> Official Title: Fiscal 2008 War Supplemental Appropriations (House)
> Cosponsors: No reported cosponsors
> Next Scheduled Action: June 19, 2008 – Scheduled action – House Rules Committee

> (Chairman Slaughter, D-N.Y.) will consider a rule for floor debate for pendiing legislation. Time TBA, H-313 Capitol Bldg. New
> NEW on this bill
> Bill Actions
> June 19, 2008 – Scheduled action – House Rules Committee (Chairman Slaughter, D-N.Y.) will consider a rule for floor debate for pendiing legislation. Time TBA, H-313 Capitol Bldg. New

So, for any Wheelers and Lakers, if you find better information, please post in the comments. Maybe we will have a longer period to act in, but history shows that we must assume the worst. That means the FISA vote, the big kahuna, is going to be Friday, and maybe even Thursday night. Heave Ho.

THE FISA FIX AND OBAMA'S PROFILE IN COURAGE LEADERSHIP MOMENT

Whether by design or random chance, there is so much information, on so many and diverse subjects, flooding the politically astute citizen currently that it is hard to keep track. It seems like we are drawn from one crisis and seminal issue to another with the passing of not every day, but with the passing of every hour. And yes, they are all pretty much that important; but there are some that portend not just how we do in our lives, but who we are and what we stand for in the first place. Chief among those is the question of whether we are a nation of men freelancing in the public trough of goodwill, or a nation of laws in which men

operate within the rule of law and under the edicts and guidance of our founding fathers and the Constitution they bequeathed us.

One of these issues has been at the forefront of out conscience for nearly a year now; the issue of how to improve the Foreign Intelligence and Surveillance Act (FISA) for the future we face and how to address the criminal violations of FISA we have suffered in the past. How we resolve FISA will go a long way indeed in indicating whether we are a nation of admirable laws or, alternatively, of mere opportunistic men.

The three critical parts of FISA that are the subject of the heated and protracted fight over reform are exclusivity, minimization and retroactive immunity. Simply put, exclusivity refers to the relative degree in which the resulting FISA law will control this area of the law. The original FISA statute was designed to be the

> …exclusive means by which electronic surveillance … and the interception of domestic wire, oral and electronic communications may be conducted.

As Marcy Wheeler has pointed out however, the Bush Administration performed a terminally disingenuous end run around the exclusivity mandate of FISA via one of John Yoo's made to order faux legal opinions. The exclusivity provisions must be made impervious to such sophistry and with sufficient teeth to insure future compliance by the executive branch.

Minimization is the word for the procedures the government uses to

> remove and (eventually) delete any data from US persons collected incidentally in the course of surveilling someone overseas. If we could be guaranteed that minimization procedures are sound, then the whole debate over wiretapping would be easier because we could rest assured

> that if the NSA picked up anything on a US person it didn't have a warrant for, it had to destroy it. That would mean that Americans could trust that they would only be wiretapped with a warrant approved (eventually, anyway) by a judge.

We live in an ever complex society served by ever more sophisticated communication means and devices. Even when our government takes it's duties to protect the privacy and fundamental Constitutional rights of the citizenry seriously, which has certainly not been the case over the last seven plus years, it is impossible to not incidentally and accidentally collect up information that should not be so obtained. Getting minimization right means that the government will not wrongfully retain and/or use inappropriately obtained information and data.

Retroactive immunity is by far the most easily understood of the three concepts. The sole question is whether or not approximately forty lawsuits, that have already been consolidated into one general whole in the Northern District of California, for the convenience and economic efficiency of all concerned, will be dismissed in order to cover up the misdeeds and crimes of the Bush Administration and the rich multinational phone companies that conspired with them, or whether they will be allowed to legally proceed so that we may all learn the truth about what has been done in our name and accountability therefore assigned. It is really, at the root, that simple; truth and accountability or craven coverup.

The desperate push on FISA by the Bush Administration, complicit and subservient Republican Congressional leaders, and their telco partners is about to explode onto the forefront again. You are already starting to see the advance seeding by proponents seeking to seed the public with fear and alarm that if we don't get on board with the whims and desires of the Bush Administration we will be exposed to

terrorism and all die. In direct response, Professor Martin Lederman performs a beautiful technical dissection of this fraudulent scare tactic in full detail here.

No, the FISA fix is not about "listenin to al-Qaida to protect America from terrists" as George Bush et al. would have you believe. We have been doing that, and are going to continue to do that; and there is no disagreement whatsoever on that point. Rather, how we resolve FISA is what the disagreement is about, and it is a glaring symbol of what we are, and are going to be, as a country. We are either a nation of laws that protects citizens and their right to seek redress for being wronged by their government and it's agents, or we are a nation of self serving men like George Bush and Dick Cheney that can, and do, get away with whatever illegal and immoral acts they desire.

Two men that have recognized that fact and stood resolutely and heroically from the outset are Senators Chris Dodd and Russell Feingold. Today, they remind us of what leadership truly is by way of a joint letter to the Democratic Leadership currently controlling the shape of the FISA fix process coming to a head.

> As you work to resolve differences between the House and Senate versions of the FISA Amendments Act of 2008, we urge you to include key protections to safeguard the privacy of law-abiding Americans, and not to include provisions that would grant retroactive immunity to companies that allegedly cooperated in the President's illegal warrantless wiretapping program.
>
> With respect to immunity, we are particularly concerned about a proposal recently made by Senator Bond, and want to make clear that his proposal is just as unacceptable as the immunity provision in the Senate bill, which we vigorously opposed. As we understand it, the proposal would authorize secret

> proceedings in the Foreign Intelligence Surveillance Court to evaluate the companies' immunity claims, but the court's role would be limited to evaluating precisely the same question laid out in the Senate bill: whether a company received "a written request or directive from the Attorney General or the head of an element of the intelligence community … indicating that the activity was authorized by the President and determined to be lawful."
> …
> In other words, under the Bond proposal, the result of the FISA Court's evaluation would be predetermined. Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the FISA Court would be required to grant immunity. To agree to such a proposal would not represent a reasonable compromise.
>
> As we have explained repeatedly in the past, existing law already immunizes telephone companies that respond in good faith to a government request, as long as that request meets certain clearly spelled-out statutory requirements. This carefully designed provision protects both the companies and the privacy of innocent Americans. It gives clear guidance to companies on what government requests it should comply with and what requests it should reject because the requirements of the law are not met. The courts should be permitted to apply this longstanding provision in the pending cases to determine whether the companies that allegedly participated in the program should be granted immunity.

Take a good look; read the whole letter. This is

what real leadership looks like. If Pelosi, Hoyer, Reid, Rockefeller, and Reyes all had even half of the "right stuff" that Dodd and Feingold possess, we would not need to have this discussion. But, alas, they do not and, as a result, our collective backs are again against the wall on FISA. More, and higher leadership needs to occur.

Barack Obama has fought long, hard and well to win the chance and right to lead both the Democratic Party and the nation as a whole. It is time for him to so lead, and his leadership will make the difference in this fight if he is willing to take the mantle. I am not the first to call on Mr. Obama to step up to the plate. Last week, when the news first broke that HPSCI Chairman Reyes was indicating his, and his fellow Democratic House Leaders', willingness to ~~compromise~~ cave and pass the Bush/Cheney FISA dream, dday at Digby's Hullabaloo made a very eloquent plea:

> I congratulate Barack Obama on his primary win and think he has the opportunity to bring forward meaningful change in America. In fact, he can start today. He can go to the well of the Senate and demand that the party he now leads not authorize new powers to spy on Americans and immunize corporations who broke the law with their illegal spying in the first place.
> …
> Barack Obama could put an end to this today if he wanted. He could tell his colleagues in the House and the Senate that they should not work so hard to codify into law what his opponent is calling for – the ability for an executive to secretly spy on Americans.
> …
> This really is identical to George Bush's position and now the Democrats in the House are signaling their willingness to go along with it. Obama positions himself as a new kind of

> Democrat who wants to change Washington and has a background as a Constitutional scholar. There is no other issue which both shows the rot of the Democratic leadership and their disinclination to enforce or even recognize the Constitution than this one.

Truer words were never spoken. The time is now Mr. Obama, and you are the man. Even the Kennedys have put Mr. Obama up as a John F. Kennedyesque figure. Well, it is time for a Profile In Courage. And not just by Mr. Obama, but by all of the Democratic Leadership. The cause is just; the time is now. Limber you fingers. Oil your fax machines. Let Mr. Obama know that when he leads on this critical issue that we will not only follow, but will have his back. This is who we are; this is what we stand for. Let him know. NOW!

UPDATE II: The ground is shifting already. From The Hill:

> Congressional Republicans are reviewing a Democratic proposal to break the logjam on electronic-surveillance legislation by allowing federal district courts to determine whether telephone companies seeking legal immunity received orders from the Bush administration to wiretap people's phones.
>
> That differs from a plan that Republicans, with support from the White House, floated right before Memorial Day that would give that authority to the secret court that operates under the 1978 Foreign Intelligence Surveillance Act (FISA). In both cases, the courts would not decide whether those orders constitute a violation of the law, according to people familiar with the language. The plan was floated by House Majority Leader Steny Hoyer (D-Md.) and has the support of Sen. Jay Rockefeller

> (D-W.Va.), the chairman of the Intelligence Committee.
> …
> "While several issues still remain, Sen. Bond believes he and Hoyer are making progress on crafting an ultimate compromise and remains hopeful that a bill to keep American families safe can be signed into law before the August expiration moves the intelligence community back to 1978," said Shana Marchio, communications director for Sen. Kit Bond (R-Mo.).
>
> Rockefeller said he is "mildly optimistic" that the plan could yield agreement, and added that the status of negotiations is "getting pretty darn good." (Emphasis added)

The Democratic Leadership takes us for fools, and treats us accordingly. They have taken the Republican/Bush-Cheney White House dream plan and substituted the words "District Court" for "FISA Court" and run it up the flag pole to see if we will salute. Even Jello Jay Rockefeller seems like he might realize that this is pitifully weak and lame and is just hoping the citizenry is stupid enough to acquiesce. Let me repost the applicable paragraph from Senators Dodd and Feingold that addresses this latest ruse, with the *only* changes necessary:

> In other words, under the ~~Bond~~ Democratic Leadership's proposal, the result of the ~~FISA~~ District Court's evaluation would be predetermined. Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the ~~FISA~~ District Court would be required to grant immunity. To agree to such a proposal would not represent a reasonable compromise.

This willingness of the Democratic Leadership to belligerently betray the trust and best interests of their constituents, party and country is simply stunning. This is weak, shameless and traitorous leadership at it's craven worst.
(h/t MadDog)

UPDATE I: Sen. Obama Phone (202) 224-2854, FAX (202) 228-4260 Courtesy of Rosalind in comments.

FISA UPDATE (AND WHY IS JOHN BOEHNER CRYING AGAIN?)

The week starts off with Main Core, Glen Fine's much anticipated IG Report has been released, today is another state election (Kentucky) in the most hotly, and closely, contested primary that many of us can remember, and, now, the tragic and deflating news that Senator Ted Kennedy has a malignant brain tumor. Oh yeah, and an extended holiday weekend and Congressional recess is at hand in a couple of days. This type of situation can mean only one thing – FISA is bubbling back to the surface. Heck, the only thing missing from this equation is a terror alert; but then again, the week is still young.

First off, where we stand. The news is not all bad, but it sure isn't all good either. From the National Journal (subscription required-sorry):

> House Majority Leader Hoyer had previously said he wanted to reach a compromise on FISA by the Memorial Day recess. GOP and Democratic aides cited several reasons why that has not happened. Late last week, Hoyer sent Senate Republicans a list of provisions that House Democrats want included in a

> final bill, aides said. Hoyer's proposal took Senate Republicans by surprise. A Republican aide called the proposal "a step backward."
>
> Before Hoyer's proposal, Senate Republicans believed that only two main issues needed to be resolved, and that they were close to reaching an agreement on them with House Democrats. One issue dealt with having the secret FISA court determine if the telecom firms should be granted retroactive immunity from lawsuits for their role in the administration's warrantless electronic surveillance activities since the Sept. 11, 2001, terrorist attacks. The second issue centered on allowing the FISA court to review the administration's procedures and certifications for surveillance operations. "We're basically there on those two," an aide said.
>
> But Hoyer's proposal included other provisions, some of which had already been defeated during votes in the Senate, aides said. One provision, for example, would allow the FISA court to assess if the government is complying with so-called minimization procedures, which limit the amount of information collected and stored on Americans incidental to the surveillance target. Another provision contains language making FISA the exclusive means under which the government can conduct electronic surveillance.

The good news is that it appears that there is little chance that anything is going to be attempted before the Memorial Day recess. The other good news, and I will be very pleasantly surprised if it maintains truth, is that Hoyer is really pressing minimization and exclusivity. These are critical concepts above and beyond the retroactive immunity part that we standardly

focus on, see Marcy's discussions, among others, here and here. These are important concerns, and Hoyer and his working crew are to be commended for keeping these concepts part of the bargain.

The bad news, however, is, as I have long feared, that the compromise involves allowing retroactive immunity, but submitting the determination on it to the jurisdiction of the FISA Court. And Pelosi is firmly on board for this:

> She told several leading House liberals — including House Judiciary Chairman John Conyers and Reps. Maxine Waters, D-Calif., and Barbara Lee, D-Calif., — in a closed-door meeting that included Blue Dogs that a compromise would likely be needed on the issue of granting immunity to the telecoms.
> …
> Pelosi is said to have argued this was needed to get a guarantee that the regulation of electronic eavesdropping would be the exclusive purview of the FISA court. Leadership and Blue Dog sources said Pelosi has made it clear that exclusivity is the most important issue for her in negotiations heading forward.

There is no question but that minimization and exclusivity are critical elements going forward, and Pelosi is surely correct that they are more important on FISA itself going forward. But it is weak, shameless and traitorous leadership that is willing to sanction and ratify the most breathtakingly egregious and widespread lawbreaking and mass violation of the citizen's rights to privacy in the history of the Union in order to get it. Especially when they don't have to, and are doing so out of raw electoral political concerns. Let's face it, the status quo is more than functional for the next seven months until a new Congress and, hopefully, a new administration takes office. There is no reason in the world that the House should not do

what they have recently done, pass a good bill and, if the Senate Republicans block it or Bush vetoes it, so be it; then tar and feather the Republicans for the act.

The FISC is too much of a rubber stamp for Administration requests, the whole application to, and determination by, the FISC would undoubtedly be done ex-parte and the whole thing classified and secret (thus protecting Administration duplicity). This is no way to go. And here is one more thing to chew on in this regard. In over 25 years of existence, the FISC has outright denied a Government application a grand total of 4 times. In many of those 25 years, the FISC was more liberal and protective of privacy rights than it is now. And here is the clincher. By my estimation, two FISC Judges, James Carr and Nathanial Gorton, had their terms expire last Sunday, and we have no idea who Chief Justice John Roberts is appointing to replace them. It is a pretty safe bet that it will be Bush compliant judges though, which certainly doesn't augur well for immunity determinations. Giving the FISC the authority to impose retroactive immunity is a very bad move and should be fought with every ounce of intensity we have mustered in the past on this subject.

As a parting shot, there is a bit of humorous irony of the John Boehner "Crying Lame" variety. Chris Frates at Politico has a timely article up today on the hypocrisy of the GOP's leading wailer:

> When a federal judge ordered Rep. Jim McDermott to pay House Minority Leader John A. Boehner and his attorneys more than $1 million in damages and legal fees for leaking an illegally taped phone call to the media, Boehner said he pursued the case because "no one — including members of Congress — is above the law."
>
> Why, then, is the Ohio Republican trying to squash similar lawsuits against

> telecommunications companies who cooperated with the government in warrantless electronic surveillance, ask the attorneys behind the class action suits.
>
> “Mr. Boehner is trying to kick millions of Americans out of court in a wiretapping case while collecting more than $1 million in his own wiretapping case. It’s the height of hypocrisy and seems to indicate that members of Congress are entitled to their day in court but the average American is not,” said Kevin Bankston, a senior staff attorney at the consumer rights nonprofit the Electronic Frontier Foundation.
>
> …
>
> Bankston said he found it insulting that Boehner would attack the attorneys representing millions of Americans as money-grubbers while he and his attorneys were “lining their own pockets.”

Boehner screams and cries to get immunity for Bush, Cheney and the telcos while denying citizens the very rights he brandishes like a peacock. Insulting money grubbers lining their own pockets indeed. Pretty much summarizes the whole Bush/Cheney regime. Nancy Pelosi and Steny Hoyer are wrong to permit these people to slip off the hook; let’s make sure they know what we think of that.

FISA: THE COMING BATTLE

As I am minding the store while mom is away tilting kilts, I was party to a group discussion

among several notable powers that be in the blogosphere early this afternoon, and the various blogs, all of which you are intimately familiar with, will be rolling out over the next few days somewhat of a battle plan on FISA/immunity. Nothing particularly new or shocking really, just a reminder to folks of the stakes involved and where the pressure points are that we need to address.

I wish I could say that there is some new brilliant, sexy and effective tact that we have lit upon to wipe this all away; but that, alas, is not the case. It will be back to the grindstone of calling, faxing and otherwise communicating with the key representatives etc. One thing I think will be critical is to offer plenty of carrots, with gentle reminders of the sticks. As you will recall, we got a surprisingly good response, and result, from the House Democrats in the last go round. We want to build, grow and reinforce that effort and result. The gathering proximity of the election is a double edged sword however. It is a chance for us to remind them of how favorably we view the last effort, but it is clearly also another opportunity for the Bushies to roll out the fear/security card and threaten the weak, and weakly situated, elements (read mostly Blue Dogs) of the Democratic coalition. It is going to be critical for those of us that actually live in districts represented by one of these souls to work them hard.

I have some things that will divide most of my attention for a few hours; although I will check in periodically as I can. In the meantime, use this space to discuss anything you feel important, but please start putting all the collective talent together to suggest ways and means for fighting the next stage of the FISA battle. My post from yesterday morning pretty much gives the lay of the land as it is understood at this moment; there are no real new baseline facts since then. Thanks.

JELLO JAY AND HOYER SLITHER BACK INTO THE FISA LIMELIGHT

Crikey, this is getting old. You may have seen by now that rumors of a new push on passage of FISA, and, of course, full retroactive immunity, are bubbling to the surface in the last 24 hours. Here is Jane. Here is Digby. Here is McJoan. From Jane at FDL:

> According to the ACLU, there is rumor of a backroom deal being brokered by Jay Rockefeller on FISA that will include retroactive immunity. I've heard from several sources that Steny Hoyer is doing the dirty work on the House side, and some say it will be attached to the new supplemental.

A few more facts and circumstances are available now than were in the earlier stories. For one, we apparently see the "urgency lever" being pressed this time around (there always seems to be one in these plays, it's a feature). From Alexander Bolton at The Hill:

> The topic has reached a critical point because surveillance orders granted by the director of national intelligence and the attorney general under the authority of the Protect America Act begin to expire in August.
>
> If Congress does not approve an overhaul of the Foreign Intelligence Surveillance Act (FISA) by Memorial Day, intelligence community officials will have to prepare dozens of individual surveillance warrants, a cumbersome alternative to the broader wiretapping authority granted by the Protect America Act, say

> congressional officials familiar with the issue.

Maybe, but if so, then the situation is intentionally so from a designated plan by the Administration to have some of their programs start running out while they are still in office and can use the "urgency" to fuel their desperate push for immunity. The reason, if you will recall, is the little provision placed in the Protect America Act (PAA) allowing any surveillance order (i.e entire general program, not just individual warrants) existing at the sunset of the PAA, which occurred on February 17, 2008, to continue until expiration, which means that there was NO necessity that any program that the government wished to pursue expire anytime during the current Administration. I have reminded folks of this repeatedly, but here is a wonderful synopsis from Cindy Cohn of EFF:

> The PAA provides that any currently ongoing surveillance continues until the "date of expiration of such order," even if PAA expires. "Orders" are what the PAA calls the demand for surveillance by the Attorney General or Director of National Intelligence (there's no court involved). These surveillance orders can be issued for up to a year at a time, and since the PAA is only 6 months old, every order issued under the PAA will still continue for at least six months, until July 31, 2008, even if the law expires. And a surveillance order issued on January 30, 2008 will allow continued surveillance until January 30, 2009.
>
> Even immunity proponent Senator Rockefeller agrees on this point. In a press release he issued today (it's not online yet) he said: "Our government will continue to have authority under the law until at least August of this year, and can even extend that authority until January 2009."

So, it is pretty likely that anything that is expiring while this Administration is in office is something that they specifically and intentionally did not care about or, better yet, wanted to expire in order to use as a wedge ploy down the road to get their immunity while they are still in office. For any program order they cared about, all they had to do was implement it, or renew it if it had already been instituted, immediately prior the expiration of the PAA and it would have then been viable and active well past when they are out of office. If they didn't do that, they didn't care. They pull this bunk every time; don't fall for it.

There is another old meme that I would like to knock back down before it gets out of hand again; namely that what is going on here is the result of panic and demand by the telcos. For all the same reasons I pointed out here at length, that just is not the case, and nothing since then has changed that fact. There have been nothing but token efforts to keep up appearances by the telcos in regards to lobbying and otherwise forcing passage of immunity. Jane mentions that AT&T hired the new big gun lobby shop, Breaux-Lott, to lead their lobby efforts on immunity. And just how many millions, heck tens of millions, of dollars did AT&T pay the two former heavyweight Senate Leaders to save AT&T's very existence in life? Uh, that would be zero millions of dollars. AT&T is expending the whopping grand total of $150,000 for their entire lobbying effort. Yep, a paltry $150K. You have got to be kidding me; they are so not even trying that they may not even be breathing on this issue.

No, if AT&T really gave a tinker's damn about immunity, they would be expending closer to $150 million than $150 thousand. This immunity push is now, and always has been, solely about protecting the dirty rear ends of Bush, Cheney and their slacker lackeys, and covering up the evidence of their blatant systematic and systemic criminal conduct. Never forget that. Instead, the push is being made through the same

old tact; Republican solidarity and immense political pressure and manipulation of the Blue Dog Democrats. Again, from The Hill:

> Hoyer has discussed various possible compromises with Blue Dogs in the hope of avoiding defections similar to what Democratic leaders saw on Republican-favored immigration legislation.
>
> "A number of Blue Dogs are working on a compromise between the House and the Senate," said Rep. Jane Harman (Calif.), a member of the Blue Dog Coalition and the former ranking Democrat on the House Intelligence Committee. "I'm working with Hoyer and working with others.
>
> "Some other Blue Dogs are involved," she added. "Blue Dogs are 47 votes; 47 votes will determine how this comes out."

Oh goody, the Blue Dogs are *still* driving the bus, and Jane Harman is *still* smack dab in the middle of the pie with her questionable history of acquiescence with Bush's surveillance program; and, perhaps more importantly, reason to cover it up. This group of constant weak links is being subjected to immense pressure to sell out the Constitution and country's right to privacy; but, again, not from the telco lobby, but rather Bush/Cheney political surrogate shadow operations. Once again, from The Hill:

> Conservative and freshman Democrats are growing skittish. These lawmakers expect campaign opponents to accuse them of imperiling national security if Congress does not enact new intelligence surveillance legislation.
>
> One outside interest group, the Defense of Democracies Action Fund, has already launched radio ads specifically criticizing Blue Dog Democrats for supporting a House-crafted intelligence bill opposed by President Bush.

Defense of Democracies is, exactly like Freedom's Watch, nothing but a high powered Bush/Cheney/RNC mouthpiece. So, the bottom line is we know what the goal of the FISA push is (immunity), we know who wants it and why (the Bush/Cheneys because they have engaged in a mass criminal conspiracy and need cover), and we know the path the push will take (GOP assimilation of Blue Dogs). Really, the only part of this puzzle we do not yet know is what the precise nature of "the compromise" is that will cravenly be peddled.

If you will remember, back in early March, there was a compromise proposal floated in the House that would allow for case by case immunity determinations to be made by courts based on certifications and *ex parte* arguments by the government. Here are the thoughts I expressed at the time, but in short, i agreed with the EFF and ACLU that it was a surprisingly acceptable proposal. The Bush Administration, of course, immediately shrieked and threatened veto. Clearly, such reasonable compromises seem to be relegated to the dustheap of history and we are now back to some other form of "compromise" that results in unmitigated full retroactive immunity. Typical of a Bushco "compromise", we give them everything they want, and in return we get jack.

If there is any two way compromise deal (as opposed to an illusion that just gives Bush what he wants), the best bet at this point is that it will involve Bushco giving slight concessions on exclusivity provisions that they do not really want, in return for getting full retroactive immunity. The other possibility that has been floated involves full retroactive immunity for telecoms in exchange for a bipartisan commission to investigate the illegal wiretapping; but this has about zero chance of being acceptable to the Bushies, they simply are not going to agree to be investigated.

So, the foregoing being what appears to be the case, it looks like we need to gear up

immediately for the same full court battle we have been having; the "compromise" is looking bad once again. That said, painful as it may be, it is time to get back to work with your fingers and phones. You know the drill. Make sure they remember that Donna Edwards is going to have a seat in Congress and Al Wynn will not; and the vote was not even close. Make them remember what this country stands for. Here is a list of the Blue Doggies. Here is a comprehensive list of contact information for all House members. And please don't forget Steny Hoyer.

MR. SIEGELMAN GOES TO WASHINGTON

From the NYT:

> The House Judiciary Committee asked the Justice Department Thursday to temporarily release former Alabama Gov. Don Siegelman from prison in early May to testify before Congress about possible political influence over his prosecution.
>
> A spokeswoman for the committee said Siegelman, a Democrat serving more than seven years in a Louisiana prison, would travel to Washington under guard of the U.S. Marshals Service. She said Committee Chairman John Conyers, a Michigan Democrat, believes Siegelman could provide important information about Justice Department practices under President Bush.

This is good news. Not necessarily because I think it will lend a lot of new facts that will do the trick to spring Siegelman from what appears to be a very bum rap, but because it will really build on the wave of national

publicity started by the 60 Minutes segment.

I have not yet seen anything additional as to details, such as who other witnesses would be, exactly what Conyers hopes to accomplish, etc. Perhaps we should help the Judiciary Committee out and come up with a game plan for them. Any suggestions?

UPDATE: Well. Wow. That was fast. I figured the request by Congress would turn up the heat on the 11th Circuit in relation to Siegelman's release pending appeal, but I didn't really want to jinx the concept by saying so in the post. BREAKING NEWS from The Birmingham News via TPM:

> Former Gov. Don Siegelman will be released from prison, after the 11th Circuit Court of Appeals granted him an appeal bond, the lead prosecutor in the case said.
>
> Acting U.S. Attorney Louis Franklin said he received a courtesy call from the court today. "He's going to be released," Franklin said.
>
> He said he was disappointed but added, "The 11th Circuit has the discretion to do that, and I respect that.

SOMETIMES YOU EAT THE BEAR, SOMETIMES THE BEAR EATS YOU – STEARNS THOUGHTS

That whole financial disaster, black hole rivaling the Great Depression, collapse of the American economy thing is oh so last week eh? Because from what I can tell this week, Britney has been on a sitcom, Barrack (gasp!) has

listened to a fiery preacher man, Bush and McCain say stupid things (okay, that is not news, but it is being reported on), and Hillary (gasp!) won't quit a race that is essentially neck and neck (and this reference does not make this a thread for discussion of the horserace, so give that a rest). What happened to the biggest financial crisis in our nation's history?

What was the the Bear Stearns takeover/bailout about anyway? Who really benefitted in the present? What does it portend for the future? I don't have these answers; but I have a lot of questions and the ground seems to be morphing so fast on this that not only are we not getting answers, the real questions are getting left behind in the wake. To paraphrase Wilson Pickett, we need to "slow this mustang down" and think about what has occurred and where it will lead us for the future. Really, the implications are pretty incredible. The federal government, under the cover of a spring weekend, stepped in to force one private financial company to sell itself to another private financial company at a price more than fifteen times less than the market valuation at the time. And then the government pledged the public's money to guarantee the worst parts of the deal. Wow. And here I thought the free market was the golden holy rule for those currently running our country ~~into the ground~~.

How did something so huge, and with so many far ranging implications, happen literally overnight? One thing is sure, if the economy was as great as they say, and Bush and his band of merry pillagers were on top of everything as much as they claim, this never would have happened. There has been plenty of discussion about the sub-prime shitpile and the exponential rise in derivitives in the financial industry, but my question here is what really happened with the Bear Stearns deal itself? Thankfully, people that know a whole lot more about this than I do are starting to ask the right questions. Today's example is an outstanding

article, "Liberalisation's Limit", by Mark Thoma at The Economist's View.

> Quoting Martin Wolf once more, he says "times of crisis are when new functions emerge." This article is something I came across in a search – it's an "interview" of Carter Glass by the Minneapolis Fed – that discusses how crises cause change (you'll see why interview is in quotes).
>
> Two additional topics are discussed in the "interview" that have come up here recently, the erosion of the "walls between commercial and investment banks" that occurred in the late 1990s (that's when this interview was conducted), and the erosion of regulatory authority as banks found ways to evade regulations, i.e. "national banks had created affiliates as a way of doing precisely those things that the National Bank Act prohibited them from doing." Thus, in that respect, the motivation for the regulatory change that produced the Glass-Steagall act is the same as the motivation for more regulatory control today – the existence of a shadow banking system outside of regulatory authority that has the ability undermine faith in the financial system, or to produce feedback effects that can cause banks under the Fed's authority to fail

Please, read the entire article (and, really, the links and sources cited therein too), it is very good.

Okay, so if I understand this correctly, the government took an unprecedented (at least under the modern Fed structure) action to insure, with the people's money, a privately sector non-traditional bank entity; and the general conclusion is that this will have to now be the new norm, but there may be a little bit of regulation in the offing in return. This seems

to be exactly where Treasury Secretary Hank Paulson and Senators Baucus and Grassley of the Senate Finance Committee are headed.

Maybe this was all the right and necessary thing to do. Maybe not. Here is what I have seen in the week plus since the Bear deal hit the public conscience. JP Morgan Chase bought Bear for less than the office building was worth, the people at Bear that got themselves into this mess are getting bonuses to stay on and create more mess, even Morgan/Chase realized the deal was too absurd and raised the purchase price, average citizens and homeowners still cannot get an ounce of relief from their government, there is no talk of banning the financial instruments that got us here and instead the government is moving to adopt, incorporate and insure them, and the financial institutions that created this nightmare have all had big gains in their stock prices because "investors" now see them as being protected by the government.

Did we just save the economy or just make a bunch of the wealthiest Bush/Republican base a whole lot better off at the expense of the taxpayers?

UPDATE: Hey, here’s a good one. Turns out that JPMorgan Chase & Co head Jamie Dimon held a Federal Reserve board seat while Chase was in negotiations with the Federal Reserve over a deal to acquire Bear Stearns at an insanely low price. How convenient.

UPDATE TWO: A post on this subject has come up on FDL by Robert Johnson, one of the presenters at the big TBA conference that Marcy recently attended. "Crisis on Wall Street – Shock Doctrine Opportunity – Notes from Take Back America Panel" Take a look at it.