SHELDON WHITEHOUSE: WE CAN'T UNILATERALLY DISARM, EVEN TO KEEP AMERICA COMPETITIVE

I have to say, the Senate Judiciary Committee hearing on the dragnet was a bust.

Pat Leahy was fired up — and even blew off a Keith Alexander attempt to liken the Internet to a library with stories of the library card he got when he was 4. While generally favoring the dragnet, Chuck Grassley at least asked decent questions. But because of a conflict with a briefing on the Iran deal, Al Franken was the only other Senator to show up for the first panel. And the government witnesses — Keith Alexander, Robert Litt, and James Cole — focused on the phone dragnet disclosed over 6 months ago, rather than newer disclosures like back door searches and the Internet dragnet, which moved overseas. Litt even suggested — in response to a question from Leahy — that they might still be able to conduct the dragnet if they could bamboozle the FISA Court on relevance, again (see Spencer on that). As a result, no one discussed the systemic legal abuses of the Internet dragnet or NSA's seeming attempt to evade oversight and data sharing limits by moving their dragnet overseas.

Things went downhill when Leahy left for the Iran briefing and Sheldon Whitehouse presided over the second panel, with the Computer & Communications Industry Association's Edward Black, CATO's Julian Sanchez, and Georgetown professor (and former DOJ official) Carrie Cordero. Sanchez hit some key points on the why Internet metadata is not actually like phone pen registers. Cordero acknowledged that metadata was very powerful but then asserted that the metadata of the phone-based relationships of

every American was not.

And Black tried to make the case that the spying is killing America.

Or, more specifically, his industry's little but significant corner of America, the Internet. While only some of this was in his opening statement, Black made the case that the Internet plays a critical role in America's competitiveness.

> While these are critical issues, it is important that the Committee also concern itself with the fact that the behavior of the NSA, combined with the global environment in which this summer's revelations were released, may well pose an existential threat to the Internet as we know it today, and, consequently, to many vital U.S. interests, including the U.S. economy.
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> [snip]
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> The U.S. government has even taken notice. A recent comprehensive re- port from the U.S. International Trade Commission (ITC) noted, "digital trade continues to grow both in the U.S. economy and globally" and that a "further increase in digital trade is probable, with the U.S. in the lead." In fact, the re- port also shows, U.S. digital exports have exceeded imports and that surplus has continually widened since 2007.
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> [snip]
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> As a result, the economic security risks posed by NSA surveillance, and the international political reaction to it, should not be subjugated to traditional national security arguments, as our global competitiveness is essential to long-term American security. It is no accident that the o□fficial National Security Strategy of the United States

> includes increasing exports as a major component of our national defense strategy.

Then he laid out all the ways that NSA's spying has damaged that vital part of the American economy: by damaging trust, especially among non-American users not granted to the protections Americans purportedly get, and by raising suspicion of encryption.

Black then talked about the importance of the Internet to soft power. He spoke about this generally, but also focused on the way that NSA spying was threatening America's dominant position in Internet governance, which (for better and worse, IMO) has made the Internet the medium of exchange it is.

> The U.S. government position of supporting the multi-stakeholder model of Internet governance has been compromised. We have heard increased calls for the ITU or the United Nations in general to seize Internet governance functions from organizations that are perceived to be too closely associated with the U.S. government, such as the Internet Corporation for Assigned Names and Numbers (ICANN).

And he pointed to proposals to alter the architecture of the Internet to minimize the preferential access the US currently has.

Let's be honest, Black is a lobbyist, and he's pitching his industry best as he can. I get that. Yet even still, he's not admitting that these governance and architecture issues really don't provide neutrality — though US stewardship may be the least-worst option, it provides the US a big advantage.

What Black hinted at (but couldn't say without freaking out foreign users even more) is that our stewardship of the Internet is not just one of the few bright spots in our economy, but also

a keystone to our power internationally. And it gives us huge spying advantages (not everyone trying to erode our control of the Internet's international governance is being cynical — Edward Snowden has made it clear we have abused our position).

Which is why Whitehouse's response was so disingenuous. He badgered Black, interrupting him consistently. He asked him to compare our spying with that of totalitarian governments, which Black responded was an unfair comparison. And Whitehouse didn't let Black point out that American advantages actually do mean we spy more than others, because we can.

Basically, Whitehouse suggested that, in the era of Big Data, if we didn't do as much spying as we could — and to hell with what it did to our preferential position on the Internet — it would amount to unilaterally disarming in the face of Chinese and Russian challenges.

> If we were to pass law that prevented us from operating in Big Data, would be unilaterally disarming.

Whitehouse followed this hubris up with several questions that Sanchez might have gladly answered but Black might have had less leeway to answer, such as whether a court had ever found these programs to be unconstitutional. (The answer is yes, John Bates found upstream collection to be unconstitutional, he found the Internet dragnet as conducted for 5 years to be illegal wiretapping, and in the Yahoo litigation in 2007, Yahoo never learned what the minimization procedures were, and therefore never had the opportunity to make the case.) Black suggested, correctly, I think, that Whitehouse's position meant we were just in an arms race to be the Biggest Brother.

I get it. Whitehouse is one of those who believe — like Keith Alexander (whose firing Whitehouse has bizarrely not demanded, given his stated concerns about the failure to protect our data

during Alexander's tenure) that the Chinese are plundering the US like a colony.

Not only does this stance seem to evince no awareness of how America used data theft to build itself as a country (and how America's hardline IP stance will kill people, making America more enemies). But it ignores the role of the Internet in jobs and competition and trade in ideas and goods.

Sheldon Whitehouse, from a state suffering economically almost as much as Michigan, seems anxious to piss away what competitive advantages non-defense America has to conduct spying that hasn't really produced results (and has made our networks less secure as a result — precisely the problem Whitehouse claims to be so concerned about). That's an ugly kind of American hubris that doesn't serve this country, even if you adopt the most jingoistic nationalism imaginable.

He should know better than this. But in today's hearing, he seemed intent on silencing the Internet industry so he didn't learn better.

Update: Fixed the Black quotation.

Update: Jack Goldsmith pushes back against the American double standards on spying and stealing here.