

ON USA FREEDOM: HEED JAN SCHAKOWSKY'S WARNING

There are two reviews of whether HR 3361 constitutes real reform today, one from McClatchy and one from National Journal, both written partly in response to privacy groups' realization that Mike Rogers has been doing a circumspect victory lap over the shape of the bill.

While neither examines the flip side of the bill – what the intelligence community will gain from this – they both provide a useful caution about the potential pitfalls in the bill, many (but not all) I've examined at this site.

McClatchy is particularly useful, though, for the comments from Adam Schiff and Jan Schakowsky, two of the only people on the House Intelligence Committee who tend to balance the interests of civil liberties against the demands of the intelligence community. Here's what they had to say about the legislative prospects.

Rep. Adam Schiff, D-Calif., an Intelligence Committee member who isn't among the letter writers, said he hoped to offer an amendment that would seek to "introduce a greater adversarial process in the FISA court" by establishing a panel of attorneys from which counsel could be selected to participate in cases that involved novel legal and technical issues.

"I believe the civil liberties protections can be improved," Schiff said.

[snip]

Rep. Jan Schakowsky, D-Ill., an Intelligence Committee member, praised the House bill. "If we could improve

it," she said, "I would go back to the original bill's provisions that would implement stronger reporting regulations and create an office of the special advocate."

Schakowsky added, though, " I am most concerned at this point about preventing any efforts to weaken this bipartisan compromise."

Remember, HPSCI held its markup behind closed doors, and there has been little leaking about what went on there, aside from Rogers' crowing. So this offers a bit of a read of what might have gone on.

Schiff, if you recall, was one of the very first people to get Keith Alexander to admit the government could conduct its contact-chaining program with the telecoms retaining the data. He is generally a pretty good read on the art of the possible. If he thinks this bill can be improved, perhaps he's got reason for optimism.

But I find Schakowsky's warning potentially more realistic.

Remember, one thing HPSCI considered was removing all definition of "specific selection term" (or "identifier," which HPSCI also included). Without a definition, the bill might only prevent bulk collection of phone records, if that; I believe the government could come up with "selection terms" for everything else that would permit systematic programs. And I suspect something like dropping the definition would – will – happen if this ever gets to a conference (indeed, as Jim Sensenbrenner knows better than anyone, that's how some of the existing loopholes got retained in PATRIOT in 2005-6, at a time when there was also bipartisan uproar over illegal spying). I think Schakowsky is realistic in worrying that, with the momentum it has picked up with unanimous passage in HJC and a voice vote passage in HPSCI, it could get worse just as easily as it could get better.

As I've said, this bill defuses the digital equivalent of a nuclear bomb by taking the phone-based relationship database out of the hands of the government. That's important.

But from there, it's unclear what effect this bill will have in practice, and could become far less clear if things like that definition disappear. So we'd be well to take Schakowsky's warning seriously.