MCCONNELL AND MUKASEY TELL HALF TRUTHS

One benefit of the process the Senate is using to develop a FISA bill is that, by rejecting the SJC bill then considering amendment after amendment that had been part of the SJC bill, we begin to learn what the government really plans to do with its wiretapping program, as distinct from what it has **said** it was doing (see Ryan Singel making the same point).

Recall that the administration has claimed, repeatedly, that its only goal with amending FISA is to make sure it can continue to wiretap overseas, even if that communication passed through the US. We always knew that claim was a lie, but the letter from McConnell and Mukasey finally makes that clear. Even still, they're rebutting Feingold's amendments—which they say "undermine significantly the core authorities" of the bill—with a bunch of misrepresentations about them, to avoid telling two basic truths (which Whitehouse and Feingold have said repeatedly, but which the Administration refuses to admit).

- They're spying on Americans and refuse to stop
- They intend to keep spying on Americans even if the FISA Court tells them they're doing so improperly

As I explained, the letter includes a list of amendments that, if they were passed, would spark a veto. Those include three Feingold amendments:

- 3979: segregating information collected on US

persons
- 3913: prohibiting reverse targeting
- 3915: prohibiting the use of information collected improperly

All three of these amendments share one overall purpose—they limit the way the government uses this "foreign surveillance" to spy on Americans.

The Mukasey-McConnell attack on segregation is most telling. They complain that the amendment makes a distinction between different kinds of foreign intelligence (one exception to the segregation requirement in the amendment is for "concerns international terrorist activities directed against the United States, or activities in preparation therefor"), even while they claim it would "diminish our ability swiftly to monitor a communication from a foreign terrorist overseas to a person in the United States." In other words, the complain that one of the only exceptions is for communications relating terrorism, but then say this will prevent them from getting communications pertaining to terrorism.

Then it launches into a tirade that lacks any specifics:

> It would have a devastating impact on foreign intelligence surveillance operations; it is unsound as a matter of policy; its provisions would be inordinately difficult to implement; and thus it is unacceptable.

As Feingold already pointed out, the government has segregated the information they collected under PAA—they're already doing this. But to justify keeping US person information lumped in with foreign person information, they offer no affirmative reason to do so, but only say it's too difficult and so they refuse to do it.

And then, they misrepresent Feingold's amendment:

> It has never been the case that the mere fact that a person overseas happens to communicate with an American triggers a need for court approval. Indeed, if court approval were mandated in such circumstances, there would be grave operational consequences for the intelligence community's efforts to collect foreign intelligence.

Of course, Feingold's amendment doesn't require court approval, it just requires that the IC segregate out information known to be US person data.

Their opposition to Feingold's reverse targeting amendment is even more dishonest. First, they say that reverse targeting is already prohibited by the bill.

> …would require an order from the Foreign Intelligence Surveillance Court (FISA Court) if a "**significant purpose**" of an acquisition targeting a person abroad is to **acquire the communications of a specific person** reasonably believed to be in the United States. If the concern driving this proposal is so-called "reverse targeting"—circumstances in which the Government would conduct surveillance of a person overseas when the Government's **actual target** is a person in the United States with whom the person overseas is communicating—that situation is already addressed in FISA today.

Note how they've turned the language describing "a significant purpose" into language describing the sole purpose—that is, they've suggested that the existing FISA bill already prohibits the collection of communications if the primary purpose is collecting communications from

someone in the US. But Feingold's amendment prohibits collecting such communication if one—out of several—purposes is to collection communication from someone in the US.

There's a reason they've played that word game. That's because, as they make crystal clear, "a significant purpose" of this bill is indeed to collect the communications of those in the US.

> To be clear, a "significant purpose" of intelligence community activities that target individuals outside the United States is to detect communications that may provide warning of homeland attacks, including communications between a terrorist overseas and associates in the United States.

That is, one of the main purposes is to collect communications in the United States.

Now I might almost be sympathetic with their point here, if they were at least more honest that that was what they were doing. But then I remember that they wiretapped author Lawrence Wright, and it becomes clear that they're already going far beyond listening to terrorists speak to associates within the United States.

Then finally, there's the Mukasey-McConnell response to Feingold's amendment prohibiting the use of US person information collected improperly. The response to this amendment is so disingenuous that it pays to read the amendment:

> (i) **IN GENERAL**.—If the Court finds that a certification required by subsection (f) does not contain all of the required elements, or that the procedures required by subsections (d) and (e) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order—

> "(I) correct any deficiency identified by the Court's order not later than 30 days after the date the Court issues the order; or
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> "(II) cease the acquisition authorized under subsection (a).
>
> "(ii) **LIMITATION ON USE OF INFORMATION**.—
>
> "(I) **IN GENERAL**.—Except as provided in subclause (II), no information obtained or evidence derived from an acquisition under clause (i)(I) concerning any United States person shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such acquisition shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.
>
> "(II) **EXCEPTION**.—If the Government corrects any deficiency identified by the Court's order under clause (i), the Court may permit the use or disclosure of information acquired before the date of the correction pursuant to such minimization procedures as the Court shall establish for purposes of this clause.

Basically, this amendment just says that if the government collects information under a program FISC finds to be inadequate either as regards targeting or minimization, and after it has had 30 days to fix those problems, then it cannot

use that data. The amendment says the government cannot use information they've collected after failing to respond to a FISC requirement to fix it.

This is the same amendment about which Jello Jay complained would require the IC to lose too much information. The Mukasey-McConnell response is almost as silly.

> The proposed amendment would impose significant new restrictions on the use of foreign intelligence information, including information not concerning United States persons, obtained or derived from acquisitions using targeting procedures that the FISA Court later found to be unsatisfactory of any reason.

That "any reason," of course, directly pertains to whether the IC has sufficiently removed US persons from its targets, or sufficiently protected US person data once it collects it. That "any reason" pertains directly to whether or not the IC has—either intentionally or unintentionally—improperly included US persons in its collection. Effectively, the Mukasey-McConnell response reveals that they intend to keep spying on Americans, whether the FISA Court approves of the way they're doing so or not.

We've been talking about this FISA stuff for almost a year now. All this time, the Administration has claimed that it was only interested in wiretapping foreign circuits that transited the US. But that's obviously just the start of what they insist on doing with this law.

They want to be able to spy on communications between the US and other countries without having to protect US person data through minimization or adequate targeting procedures. George Bush is basically trying to legalize his illegal spying program, all with the willing assistance of the US Congress.

Note: the Senate will shortly start debating FISA again, but McCaffrey the MilleniaLab says it's time for his walk NOW (he didn't get his nighttime walk last night bc mr. ew was almost as interested in the results as I was). So use this as a thread to follow what's going on. Will return shortly—it's raining and McC doesn't like to get his hair wet.