

FISA LIVEBLOG: KIT "I THINK RED TIES LOOK GREAT WITH PINK SHIRTS" BOND

CSPAN's stream is being a bit cranky, but I've got Kit Bond on the old style teevee, and boy I'm not a fashion maven, but I wouldn't wear a red tie with a pink shirt.

Boy, Kit Bond must be really tired of having to manage a debate against the very much smarter Russ Feingold. He just tried to refute Feingold's point that 70 people shouldn't vote for immunity when they don't know what they're voting immunity for. He said, "that's okay, that's why SSCI is there." Ah, but Mr. Red Tie, if SSCI can't award immunity on their own (as if Congress can, but nevermind), then I guess it's not enough, huh?

Bond just said Judge Walker's opinion doesn't stand up.

Shorter Kit "Mr. Red Tie": I realize a judge has said Cheney's whole notion of inherent authority is bunk. But I disagree. And while I'm happy to let Article II boss me around, I'll be damned if I let Article III boss me around.

Kit Bond: IGs will not determine whether the illegal program was legal or not.

House and Senate Intelligence Committees are all the oversight you need, little boys and girls. Never mind the Courts!

Specter: A member's constitutional duty cannot be delegated to another member. The full body has to act. The question for the Senator with the red tie is, how can 70 members of the US Senate expect to grant retroactive immunity in light of the clear cut rule that we cannot delegate our Constitutional responsibilities.

[Is this the day Haggis returns to US

law?!?!?!?!]

Bond: well, SSCI predates me.

Specter: Uh, yeah, I know. I used to chair it, remember?

Specter: SSCI hasn't even all been briefed on the stuff they're supposed to be briefed on. Judge Walker with his 56 page opinion that bears on the telephone case. Have the telecoms had problems with their reputation? Perhaps. They can recover from that.

Specter: Does the Senator from Missora know of any case involving constitutional rights where Congress has stepped in and taken it away from the Courts where there's no other way of getting a judgment on the constitutionality of it?

Mr. Red Tie: What Specter fails to understand, it's not a question of carriers being held liable, what they would do is disclose the most secretive methods used by our intelligence community. It would also expose those companies to tremendous scorn and obliquy and possibly injury to them or their personnel.

Specter: Nope, Bond couldn't come up with one example.

Senator Bingaman: Explaining his amendment.

Note, this is a total suspension—which means there's no risk the program would be determined illegal while the IG was investigating.

Bingaman: Red herring: AG and DNI bill say my amendment fails to address risk that ongoing litigation would lead to release of sensitive information. I suggest that AG and DNI need to read the amendment I'm offering. There would be no ongoing activity during the time when these proceedings were stayed.

Mr. Red Tie: I assume this is a political move to undermine the "liability protection." I can only assume that will be followed by another effort to delay relief.

God, Bond is a cynical fuck.

Mr. Red Tie: Now beating up Specter. I can tell your our soldiers under tremendous threat. To say we don't care when they are attack. That goes way way way too far. That's not reasonable.

Bond now swiftboating Specter.

Shorter Bond: I think the telecoms need more protection than my own son.

Jello Jay: God forbid we wait 1 year until we give them immunity!! After all, do you realize they'll be collecting information throughout this period?

At least Jello Jay is a sharper dresser than Kit Bond. Otherwise, they seem indistinguishable.

Jello Jay: Golly, we can't improve this bill because then Bush will veto it.

[Thanks to Mike and Mike for their little kabuki with the veto threat!! Works like a charm with Jello Jay!]

Jello Jay: Specter lamented the fact that these documents were only served with intelligence committees. But we got all the important facts declassified. Trust us! Because I'm so smart.

Jello Jay: Why couldn't you just read the report? That makes the fact that the Administration told us to fuck off okay, you know.

Jello Jay: Mr. Red Tie just told me to say the following things. I ask unanimous consent clarifying ... oops. Forgot what he asked me to say. Oh yeah, Mort Halperin likes us!

Pat Leahy: Oppose grant of immunity. Ill-advised attempt to tell a fellow branch of government what they should decide. The fix is in. The bill is rigged. This tells the courts to take part in a cover up.

Specter: Call up amendment.

Specter: Monetary judgments don't level up with privacy.

Quotes Judge Walker.

Whitehouse: [Jello Jay yields time] A self-inflicted wound that this Administration inflicted on this govt. We in Congress clean up mess. Legislative fix misapplies substantial evidence standards, trespasses constitutional boundaries. We wouldn't be in this position of BushCo had sought a court order in the first place. Administration chose to work outside the law. I suspect the Administration wanted to prove a point about Article II. Administration walked telcos into this problem to vindicate ideology.

[Repeating all the times the Republicans have said "Good Faith."]

We seem to agree that good faith is the proper standard. We should let a court determine. We in this body may assume it to be true, but it is not our role. We as a body are incapable—incapable—of making an informed conclusion. I have not had the chance to offer this amendment. The Bush Administration was not confident that a "good faith" threshold would be meant. We should reflect on what substantial evidence means. Substantial evidence—used in adversarial proceedings. Standard used to weigh result of adversarial process. Here the Court would apply to AG's unilateral certification. That's just bad lawyering. Constitutionality of Title II. No branch of govt may exercise powers allocated to another branch. Framers felt, in drafting Constitution, sharp necessity, to separate legislative from judiciary power. Crescendo of legislative interference with private matters of courts. Congress telling courts "you cannot hear an entire category of constitutional complaints." Webster v. Doe, serious constitutional question would arise if federal statute would deny any judicial forum for colorable claim. This statute has as its purpose to deny judicial forum for colorable claim. Not only separation of powers, but veers near of running afoul of judicial takings. Congress usually provides at least a fig leaf of

another remedy. If I were a litigant I would challenge this statute on Constitutional grounds, and I would expect a good chance of winning. I hope that our great judicial branch will vindicate the error that we make today.

Specter: colloquy?

Jello Jay: Specter would require constitutionality before dismissing cases. Specter's amendment would undermine this bill.

Specter: Can you name a case where COngress has interceded?

Jello Jay: Judge Walker's case won't stop. This bill only address cases against carriers.

[Jello Jay pretending that Walker doesn't have a lapful of other cases, the cynical fuck.]

Specter: No duh. If the conduct violates the constitution, it violates the constitution, no matter how good the faith might be.

Specter: If he has said terrorist surveillance program is unconstitutional, he has given a road map of what he's going to do. Where he said TSP was unconstitutional and statute covers pen registers and trap and trace devices, to remove the case from him at this stage flies in face of historic role of courts since Marbury v. Madison.

Jello Jay: Haggis doesn't talk about security of the nation enough.

Haggis: Take sharp distinction with Chair when he talks about no recognition of work on and special expertise of Intelligence Committee. I served as Chair. I take sharp exception that there's not an awareness of terrorist threat. Chair says this has gone through laborious process. That happens all the time. I've been here 28 years and I know exactly what goes on. When you say this ought to be accepted I disagree--this bill could be made better. When you say you deal with intelligence and I deal with constitution, I disagree, we can't ignore constitutionality.

Haggis: Colloquy with Whitehouse.
Constitutionality of a member to delegate authority? Can we delegate our authority to vote.

Jello Jay: There are 37 members of the Senate who have been briefed. We decided to do a bit of homework. 15, 19, -4, 2 leadership on each side, Roberts, and appropriation committee Chair and Vice Chair plus Levin and McCain as ex officio.

Specter: 17% in House. You still have a majority who have not been briefed, who have delegated their authority, voting without knowing what they're voting for.

Whitehouse: I did say that I believe that this body is incapable of making determination as to good faith. Very few of us, less than a majority have been briefed as to the facts. As I said in my remarks, every Senator has referred to good faith. I view it, though I defer to far greater experience of colleague from PA, legislative prudence, it is not prudent as a Senate to take it upon ourselves, judicial tribunal, confidentiality, judicial agency that makes good faith determinations. Agree with Senator from PA's concern. Less about my ability to cast my vote, untrammled. It'd be imprudent, but it'd be constitutional.

Specter: Any case pending in Federal case for 3 years where Congress has stepped in.

Whitehouse: Aware of none. I am aware of no precedent of Congress stepping into ongoing litigation, choosing a winner and loser, separation of powers is particularly acute where cause of action is a constitutional claim. Judge Walker is listening to constitutional claim. We may not take away rights of people in this country to have constitutional claims adjudicated.

Levin: Title II would authorize immunity for those who collected intelligence in defiance of FISA. I have sympathy for telecoms, but also sympathy for Americans who may have had their privacy rights violated. Bill makes no effort to

reconcile these competing interests. Of course intelligence committee claims it was legal. Specifically states that the letters made the claim they were legal. Not fair, wise, and necessary. It leaves innocent American citizens harmed by unlawful conduct of telecoms without any legal remedy at all. Hard to imagine how AG can claim this is a fair and just result. Those who have been harmed unlikely to have any recourse bc govt officials enjoy qualified immunity. Don't even have burden of demonstrating their actions were legal. Nor is it wise. Retroactively eliminating rights of citizens. If we act here, our laws and their prohibitions will be less of a deterrent to illegal actions in the future. Not necessary for the intelligence community to collect intelligence. They HAVE THE RIGHT to use newly available technology, under Title I of this bill. Provides that AG can direct telecoms to participate, enforceable by court order. We are collecting intelligence today without any retroactive immunity. Admin argues that if we don't provide retroactive immunity, telecoms will be less likely to help. Prospective immunity. Can be compelled to do so. What companies might be less willing to do is assist govt in activities that are illegal. Do we really want to encourage this? Bingaman modest amendment. We can pass this bill, ensure IC can continue to collect intelligence on suspected terrorists without sacrificing privacy rights of Americans.