THE FISA LOSS: RECOMMENDATIONS FOR THE FUTURE

Selise's superb diary on FISA has finally persuaded me to write a post that I've been thinking about for some time: a recap of the FISA fight with thoughts on what we could have done differently.

Before I talk about what we could improve though, let me say this. Everyone involved, Republican, Democrat, House and Senate, attributes the unexpectedly tough battle over FISA to the work of the Netroots: bloggers, MoveOn, and most importantly their readers, partnering with the civil liberties groups and a few leaders in Congress to push back against a legislative tidal wave. Aside from Josh Marshall's resoundingly successful campaign to save social security—in which public opinion and Democratic leadership always supported the same goals as the Netroots—this was the first real sustained legislative campaign waged by the Netroots. We were fighting against a telecom and intelligence contracting industry that, in addition to being rich, has been fighting these battles for years. Looked at from that perspective, we had remarkable success. And if we replicate this effort on other topics, we will have more success in the future. In fact, I rather think the news that Chris Dodd is one of the few people confirmed to have made the vetting stage of the VP search (though I highly doubt Obama will choose him—I think it's political theater), when Hillary and Jim Webb and Joe Biden and others have not, suggests Obama recognizes that he took our efforts too cavalierly. We did a lot right in this fight; if we learn the right lessons from it, we will be more powerful and effective in the future.

That said, here are some things we should do in the future:

- Improve intelligence oversight
- Admit we're dealing with legislators
- Identify the real terms of debate
- Recognize when leadership begins to negotiate
- Profile all the key players

Improve intelligence oversight

As Selise points out in her diary, we were fighting against a leadership that—because they were among the only ones briefed on the President's illegal program—had an incentive to support telecom immunity because they had, at least by virtue of not mounting an effective opposition to the program, bought off on it. The still-serving Democrats who had been briefed on the program before it became public in 2005 are: Pelosi (from the very first briefing on October 25, 2001 as HPSCI ranking member, and continuing as House Minority leader), Reid (in his role as Minority Leader on March 5, 2005), Inouye (in his role as Defense Appropriations Chair on December 4, 2001), Harman (in her role as HPSCI ranking member starting in 2003), Jello Jay (in his role as SSCI ranking member starting in 2003). All but Reid voted in favor of the final bill (House roll call, Senate roll call), and even Reid failed to do a great number of things to prevent passage of this bill. Jello Jay, Jane Harman, and Nancy Pelosi all provided critical leadership in ensuring final passage of this bill. Add in the Democrats who were briefed on the program after it became public but while it was still illegal—Murtha, DiFi, Levin, Holt, Cramer, Eshoo, and Boswell, and only Levin, Holt, and Eshoo voted against the bill.

Partly, that simply says that we've got far too many Blue Dogs like Boswell, Cramer, Harman, and DiFi in relatively senior positions in intelligence oversight. And partly, this is just

a factor of the fact that, by briefing the Gang of Eight, you're sure to implicate those who have the ability—going forward—to lead on legislation pertaining to intelligence.

But that's not sufficient explanation. Jello Jay, Jane Harman, and Nancy Pelosi all tried to object to the program in one way or another. How each of them did so—and why their objections ultimately failed to exonerate them from responsibility for the illegal program—is instructive.

Say what you will about Jello Jay, but his attempt to establish a legislative record was perhaps the most effective (which is a testament to how pathetic intelligence oversight is, not to Jello Jay's effectiveness). As this post explains, in the middle of an ultimately successful Congressional attempt to withhold funding from any large scale data mining program (which is probably one of the reasons why Bush's program would be judged illegal on the part of the Courts), Jello Jay informed Dick Cheney that he thought that the warrantless program sounded like the TIA program Congress was in the process of making illegal.

> I am writing to reiterate my concerns regarding the sensitive intelligence issues we discussed today with the DCI, DIRNSA,Chairman Roberts and our House Intelligence counterparts.
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> [snip]
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> As I reflected on the meeting today, and the future we face, **John Poindexter's TIA project sprung to mind, exacerbating my concern regarding the direction the Administration is moving with regard to security, technology, and surveillance.**

In short, Jello Jay created a legislative record that stated the Administration's program violated Congress' intent to—by exercising the power of the purse—end precisely that kind of data mining program. Now, it's not clear why

Jello Jay didn't use that legislative record to object strenuously when he discovered that the Administration continued to break the law in spite of Congress' legislative efforts to make it illegal. But it's possible that the signing statement Bush issued when he signed that bill is the reason.

Jane Harman did not object strenuously to the program until after NYT revealed details of the program and she first realized that she had not been briefed on all aspects of the program. At that point, she did try to do some real oversight.

> The New York Times story ran on December 16, 2005. The next day, President Bush publicly confirmed the program's existence in his weekend radio address. That day, a Saturday, I did two things: I tried to get our full Committee briefed and I consulted experts on the law.
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> I tracked down NSA Director Michael Hayden, who was shopping for holiday presents in Annapolis, and asked him to brief the full Intelligence Committee later that day. **He said yes, provided the White House signed off. Bush Chief of Staff Andy Card at first agreed, but called me back an hour later saying the briefing was off**. (It was months before the White House briefed additional Members of the Intelligence Committees. **I even spoke with Vice-President Cheney about the need for a full Committee briefing, but he turned me down flat**. Finally, on the eve of Gen. Hayden's confirmation hearing to be Deputy Director of National Intelligence, the Administration agreed to brief all committee Members.)
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> Additionally, as the President had disclosed the program, I was finally free to consult constitutional experts on the legal issues it raised. My call

> to a former CIA general counsel that Saturday provided the first inkling that the program was in not compliance with FISA but was conducted pursuant to claims of "inherent" executive power.

Probably, though, since she had apparently already failed to object when told DOJ had problems with aspects of the program, it was too late for her to do much but demand expanded oversight.

Nancy Pelosi's objection to the program is most troubling. When, on March 10, 2004, the Administration came to Congress and asked whether, in light of Comey's refusal to reauthorize the program, Congress could do a quickie law making it legal, the Gang of Eight said legislation would be impossible on that short notice, but a majority of those present did not object to the continuation of the clearly illegal program. That's critically important for the issue of immunity—Congress couldn't very well advocate holding the telecoms responsible for accepting an authorization from the White House Counsel, could they, if they knew and approved that the program should continue even after Comey determined it legally problematic. Nancy Pelosi says she objected to continuing the program, but admits that, by a majority vote, the Gang of Eight gave legal sanction to continuing the program even though it was legally problematic.

> Speaker Nancy Pelosi of California, who attended the 2004 White House meeting as House Democratic minority leader, said through a spokesman that she did not dispute that the majority of those present supported continuing the intelligence activity. But Ms. Pelosi said she dissented and supported Mr. Comey's objections at the meeting,

Now it's unclear whether Pelosi and the others knew how strong Comey's objections to the

program were. But when a majority vote is enough to give legal cover for the President when his own DOJ objects to one of his programs, that's a problem.

We need to get better Democrats on the intelligence committees (and put Holt and Feingold, respectively, in charge of them). We need to demand that Gang of Eight members have a means to make an effective legal objection to a given program (perhaps by allowing them to demand court review of a program?) and that majority rule cannot have the effect of making the entire Congress complicit in illegal acts. We need to enforce the law that requires the full Committee to be briefed—as well as technically knowledgeable staffers. (Marty Lederman offered more suggestions back in December.) If we don't do these things, the Gang of Eight will continue to be a rubber stamp that will, if a problem with a given program is later exposed, serve as complicit legislative leaders cooperating in the cover-up rather than means to hold an Administration accountable.

Admit we're dealing with legislators

We did a superb job on this campaign—largely through the efforts of Matt Stoller, who got FISA statements from the special election candidates and primary challengers—in proving that opposition to immunity was not a losing electoral issue. We—along with our coalition partners—did an amazing job at moving public opinion on this issue. But what we didn't do, I think, was account for the fact that a significant chunk of legislators believe they are in the business of crafting compromises, no matter how outrageous one side of the debate is. That is, while we were successful in working with key legislators (Dodd and Feingold above all) to argue that the issues at stake—and the Constitution—had to be beyond compromise, that didn't stop a solid chunk of Democrats from seeking compromise anyway.

Significantly, instead of thinking of ways to explain what an acceptable compromise and an

unacceptable compromise would be, we usually insisted that there should be no compromise. As a result, we had virtually no ability to influence those Democrats who sought a compromise on this issue, nor any ability to help hopelessly flawed legislators like Arlen Specter or—for that matter—Barack Obama craft and develop the support for a less evil compromise. On key example is exclusivity—a critically important provision, sure, but as Kagro points out endlessly, will ultimately always fail to check a President who has an OLC hack claiming he's got unlimited inherent powers. How much could we have gotten, instead, had we pointed out that exclusivity was already in FISA and that we'd be better off winning "compromise" on other issues? Until we succeed at populating Congress with more and better Democrats, we're going to have to understand that at least a third of Democrats in Congress will be seeking compromise, and we should be prepared to incorporate in our message clear lines about what would be acceptable and unacceptable levels of compromise.

Perhaps the thing to do in the future is to assign certain coalition members the task of understanding what the terms of compromise are, and then crafting our message in such a way that, while we insist that no compromise is possible, we at the same time make it clear where the complicit Democrats ought to be negotiating and where they shouldn't be.

Identify the real terms of debate

We did a superb job at moving opinion on the debate about telecom immunity. Indeed, our early focus on telecom immunity, with the message discipline and clear ask it gave us, as well as a Presidential candidate to champion it, was probably part of the reason for our success on this issue.

But we failed to account for a rhetorical strategy the Administration used brilliantly, even while we occasionally pointed it out clearly.

The Administration told us, back in 2005, in 2006, in 2007, and to some degree, even in 2008, that it needed Congress to amend FISA to account for changes in technology (digital telecom) that meant it needed to be able to tap foreign communications from within the United States. Of course, that was just a fraction of what it wanted from Congress. Indeed, it used its story about digital telecom to explain what it wanted to do, rather than admit that it wanted to access emails that resided on servers in the United States, as well, an admission that would have been far more troubling to the Americans who regularly use email.

More importantly, the Administration demanded the ability to use basket warrants without admitting what that meant—one of the key asks it was making was the ability to data mine the vast stores of data, probably including US person data, vacuumed up off the telecom circuits. This was clear from the early attempts to negotiate a deal before Democrats got the majority. It was especially clear during the Protect America Act, when the Administration rejected any attempt to fix the purely technical, US wiretapping aspect of things.

But we didn't make a concerted effort to, first, make it clear precisely what the Administration was demanding (to his credit, Russ Feingold, even limited by secrecy rules, was able to do this the best). Thus, while many people were opposed to telecom immunity, we never really generated the public opposition to massive data mining that (the history of TIA makes clear) is fairly easy to develop in this country.

More importantly, we did not make a concerted effort to either suggest that this data mining didn't offer enough protections to Americans, or, more importantly, was unnecessary or ineffective. Every time McConnell or Mukasey had to justify these powers, they pulled up an example (like the foiled liquid explosive on planes attack) that didn't rely on the vast new powers or (like the Iraqi hostage situation or

the ability to find who in the US was communicating with a known Al Qaeda hub overseas) were intelligence failures for a reason that had little to do with the actual FISA law. Given press reports about how crummy the leads from the original program were, we have every reason to believe that this enhanced spying results in a deluge of information, must of it red herrings that actually end up wasting law enforcement officers' time.

We never challenged the Administration's contention that the data mining aspect of this program was effective. And as a result (I'm thinking charitably), people like Barack Obama and Sheldon Whitehouse and Bob Casey and Max Baucus, who opposed immunity, still claimed it was necessary to vote for the overall bill, arguing that the underlying program—the data mining, really—was so important that they had to pass the bill regardless of the problem with immunity.

To do this better in the future, we need to find a way to both mobilize around one disciplined talking point (telecom immunity) while still fighting the battle for influence across the whole scope of the debate.

Recognize when leadership begins to negotiate

I ineffectively tried to say something with this post that—if I had to do it all over again—I would have tried to say much more strongly. What I should have said was:

> It is clear that the RESTORE Act, which Steny negotiated and led to passage in March, was just the opening salvo in a negotiation that Steny is determined to carry through to a compromise resolution. Therefore, we ought to recognize that Steny threw that opening salvo, and be prepared to argue for which parts of the final compromise we feel are deal breakers and which are not.

In other words, when the House passed RESTORE in March, we took it as an end point, a bill we hoped we might be able to force on the Senate. But we should have suspected form Steny's first round of negotiations—and we really should have recognized when we first learned Steny was negotiating directly with the White House in May—that that bill was meant to served only as a bargaining point, not as the end product. My effort to say, what would it take to make a bipartisan commission effective, was an attempt to brainstorm what we ought to be pushing Steny for in a final compromise, even while I still hoped we could avoid compromise. It's a moot point, now, but had we done so, we might have put some teeth in the IG inspection requirement, thereby ensuring that, in exchange for his telecom immunity, Bush had to accept a real public airing of the ways he broke the law on this. As it is, because we didn't realize that Steny was negotiating down from the original bipartisan commission that RESTORE mandated, we allowed Steny to turn it into a potentially meaningless sham, even while he was able to use it to coerce some who wanted some kind of accountability in the bill.

I don't know how to recognize when that moment of capitulation has begun—but in the future, we'd do well to assume that once Steny touches something, the negotiations have begun in earnest.

Profile all the key players

One of the things I'm happiest about, looking forward, is the Blue America campaign against Steny Hoyer. I think Hoyer is an appropriate target for our anger, not least because he had the gall to negotiate directly with the Administration, shutting out key Democrats in the process.

Still, while we did a lot of work early on to examine Jello Jay's funding from telecoms, it seems we forget to consider the fact that our Majority Leader has a district that lies right between DC and Fort Meade, home of the NSA. His

district has a lot of work from contractors to the NSA. Take ManTech, which—if this article has any basis in truth, is surely one of the biggest unacknowledged beneficiaries of "telecom" immunity. Aside from DC itself, Steny's district is the biggest location for ManTech, bigger even than Fort Huachuca and Steny is a top recipient from its PAC.

Now that should not, by itself, lead to a bad bill. But aside from all the leadership interests in the Democratic party, and those who really did want a compromise, no matter how bad, we ought to have noticed that by far the best deal-maker in our party has genuine constituent interests (and donor interests) in capitulating on the FISA bill. No one ever pretended that Steny was a credible negotiator on this bill, but we could have done a better job, earlier, in demonstrating that Steny had other interests at stake.