

PATRIOT AND STATE SECRETS MARK-UP, 2.1

We're back, waiting to get a quorum. Watch along here.

Schiff: Strike ordinary pen register and trap and trace changes. Follow-up to Rooney amendment, potential unintended consequences on changing trap and trace. Avoid unintended consequences.

Smith: Strikes higher standard for pen register and adds audit.

Schiff: Yes. Calls for same audit in one context extended to FISA and criminal context.

Smith: Improves bill, not to extent we can support bill.

Passed on voice vote.

Issa: Strike section 106. Sneak and peek. Existing bill limits judges discretion in granting permission for delayed notice. Imposes standard which shall not be achieved.

[This is being held for the moment, now moving to State Secrets]

Resolution of inquiry from Lamar Smith on Medical Malpractice.

Nadler: State Secrets. Uniform standards for state secrets. In order for rule of law to have any meaning, must have recourse in court. If wiretaps your phone, steals your gun, kidnaps and tortures you, only remedy is to sue the govt. If exec can have any case dismissed on any incantation of state secrets, not simply excuse to shield illegal or embarrassing information. There can be no law, no rights and no liberty if exec can do anything it wants behind wall of state secrecy. Holder policy welcome, but not enough. Internal policing, but still permits exec to be its own judge. Congress has provided guidance to courts on handing sensitive info in

other contexts. Several witnesses who have submitted evidence, courts have proven themselves fully competent, that is Courts best qualified to balance risks of disclosing evidence. Only govt interlocutory appeal. Prohibits dismissal at outset. Would require Court to rule on actual, not hypothetical harm. Requires all judges review info to determine whether harm is likely to occur. Currently each judge decides whether to review or whether to accept govt's assertions. If judge determines privilege has been asserted, consider substitute. Where no possible substitute, allows dismissing or finding for or against. Modeled on CIPA. Same type of flexibility in civil cases as in criminal cases. Courts, find balance.

Sensenbrenner: State secrets long-standing. SCOTUS most recently described in Reynolds. May occasionally disprivilege someone suing in court important to protect all Americans. Obama Administration not enamoured with this legislation.

[Shorter Jim Sensenbrenner: I'm as fond of Democrats abusing power as I am of Republicans doing so.]

Conyers: Want to thank Gentleman for research in which he has allied the current president with the past president.

Nadler: Sensenbrenner helped make the case for this bill. Kennedy: "District Court will use discretion" to protect valid state secrets. Yes. That's the point of this bill. Many courts will use discretion. Many courts will say we won't look at it. What this bill says is you have to look at it. Court should do exactly what J Kennedy said, and assess validity of state secrets. Also said we use deference, with FOIA is to obtain public disclosure. Has resulted in abject deference. In civil cases, the goal is the suit isn't public disclosure. Alleging injury. Greater constitutional concern. Should not require undue deference. Yes, we must protect state secrets if validly asserted. We know that govt in Pentagon Paper said sky would

fall. Reynolds case, establishing state secrets, govt lied to Court. In fact, when became public, nothing to do with that. Air force negligence. Even if state secrets had constitutional origins. Until Bush Admin, ss used only to say you can't see that doc. Under Bush, sadly supported by Obama Admin in court, new use, move to dismiss case, right after first pleading, on grounds that consideration will result in revelation of ss. Not evidentiary protection, but use of doctrine to preclude consideration at all. This bill says you can't do that. What that means is they're not protecting state secrets. Govt can do ANYTHING to you. Can violate second amendment. When you sue them to say stop, they say, you can't consider the case. SO you can't get into Court. It may be that SCOTUS will say you can't do that. Unfortunate that Obama Admin taking same position. They haven't taken it publicly. So for those reason urge to support bill.

Smith. Join Obama Admin in opposing bill. Obama has resstated state secrets four times. Serves essential purpose of protecting secrets. Leahy just monitoring Admin's policy.

Back to PATRIOT:

Issa: Will and may language (this is a compromise that will likely go through on voice vote).

Bill passes 16-10.

Back to State Secrets.

Nadler Amendment: 3 technical changes. First stream-lines process for attys w/clearances. Clarify aspects of what happens after Court determines ss valid or no. Court issues orders if ss does not apply.

[Good for Nadler—he's putting in requirements to give atty clearance or appoint one who has it]

Goodlatte: Support amendment, not bill.

Schiff: No guidance on how to evaluate testimony of govt versus other witnesses. In Senate leg

include substantial weight standard. Provide that govt's assertion of harm be given due deference. Will facilitate court in understanding whether witness possess broadest possible information on disclosure of state secrets.

Nadler: Secondary amendment. The whole point, we're asking court to judge whether govt's assertion is valid or not. Has to be hearing. Secret in camera hearing in front of judge. Due deference. Putting thumb on scale. In FOIA, you rarely see judge disagree with govt. Govt here not disinterested party, govt has allegedly wronged someone.

Lungren: Rise in support of Schiff amendment. SCOTUS has said clearly that a claim of privilege on ground that info constitutes diplomatic secrets necessarily Article II. Constitution gives deference. US Constitution does that.

Lungren now quoting Navy v. Egan without noting that it allows for Congressional limitations.

Nadler: Egan recognizes broad authority. Unless Congress has provided otherwise.

Thank you Nadler. I like when the lawyers come in and defend my slapdown of stupid Republicans channeling David Addington.

Nadler: Bill says court shall weigh in same manner. Schiff takes out and subs "due deference." Secondary would put back in, weigh in same manner, in making such an assessment, as supported by material reviewed under section b1. So long as supported by something in record.

Delahunt: Recommends Nadler removes secondary amendment and opposes Schiff. I think we have learned that executive power should be limited. We've had significant difficulty receiving from exec collaboration necessary for effective oversight. It's time to reassert the Constitutional authority of US Congress, task judiciary with its obligations under the constitution and not continue this abject

deference to the executive. They will make the case as to the need to the assertion of the privilege. Do not want to see continued trend toward unfettered exec power.

Gohmert: Agree respect from CA. Regarding part where he said due deference borders on irrefutable. Doesn't mean irrefutable. Due diligence means due deference.

Delahunt: Judges will interpret to give credence to what may irrebutable. Tell the courts that they have obligation as separate order of govt. If we are going to have a system of checks and balances everyone has to do their part.

Gohmert: some experts think constitution ought to be scrapped.

[You ignorant fucker, the constitution requires separation of powers. YOU'RE the one ignoring the Constitution]

Schiff: Constitutional core, some Article II power, to say revelation would be so injurious that exec can preclude that.

Gohmert: Both sides of aisle, administrations claiming privileges they shouldn't have. Should not be irrefutable.

Jackson Lee: This amendment skews balance. Article III courts give deference.

Gohmert: If we vote it down, courts can look at legislative history.

Schiff amendment fails 13-17.

Schiff:

Nadler: Compromise?

Schiff amendment does something with which attorneys.

WOOT!! We have a state secrets bill. 18-12 vote, with just Schiff crossing aisle to vote against.