

PATRIOT AND STATE SECRETS MARK-UP, DAY TWO

Here's Jerry Nadler, in yesterday's hearing, explaining how the PATRIOT reauthorization attempts to balance privacy and national security.

Follow along today's hearing here.

Oops, I had some technical issues. Started up late. Apparently Lamar Smith is attempting to keep Lone Wolf.

Conyers now explaining that Suzanne Spaulding says govt could always seek criminal warrant for a Lone Wolf. Lone Wolf provision not in original PATRIOT, nor the one that got substituted in middle of the night in rules committee, got added for reasons not remembered by me now. Govt already uses criminal warrants with domestic terrorists, comparable to Timothy McVeigh. Tom Evans says Lone Wolf not constitutional.

Chaffetz: My understanding is that DOJ is in favor of keeping this in place.

Smith: I agree with President of US and DOJ and FBI that this needs to be reauthorized. Let me address again those who argue that we can substitute criminal wiretaps. Wiretaps that the evidence will be turned over to defendant. In case of this provision, dangerous to turn over, bc it might reveal sources and methods. Second reason, criminal wiretaps require live minimization. Translating foreign language, live minimization impossible. I don't know if gentleman from CA would like for me to yield to him?

[Interesting, this is where Adam Schiff pushes right.]

Nadler: Only heard one of Mr. Smith's two points, that if you use lone wolf, if you use

Title III, that is done with view toward using evidence in court, if evidence collected that was secret, bring CIPA into play. Not a valid reason for having new section of law.

Fundamental reason for not extending it, if you don't show connection to foreign power, no justification for going beyond Fourth Amendment. Fourth Amendment is a protection in criminal law, when you have lone wolf, who by definition is not foreign intell, then it makes this whole thing unconstitutional.

Smith: It does add to burden.

Nadler: SCOTUS has made it clear that Fourth Amendment applies to all persons in US.

Smith: Live minimization. Speaking foreign language.

Sensenbrenner: Support amendment of gentleman from TX. Lone Wolf plugged the hole. Maybe bc the hole is plugged, not necessary to use it, but if we create the hole again, we create a gap that terrorists will exploit. Prosecution required to disclose in open court, phone conversations disclosed in court, result indicated that we weren't able to use that surveillance method day after it became used in trial.

[The Republicans keep arguing that any hole in PATRIOT will be used by AQ, even while arguing that parallel holes in civil liberties protections won't be used by investigators. I guess some human beings are either shrewder or less human than others.]

[Sensenbrenner is arguing that al Qaeda was successful on 9/11 bc of the earlier World Trade Center trial.]

Conyers: Lone wolf never came before judiciary committee.

Sensenbrenner: DOJ realized it needed it in 2004.

On this, Schiff and Quigley voted yes (that is, to keep the Lone Wolf provision.) Also there are

a lot more Republicans present, it looks like. Looks like Conyers had to keep this one open long enough to get the votes. 15-15 vote.

They're breaking for a vote right now. I'm curious that Quigley was the one person—besides Adam Schiff, which I have predicted—who voted to keep Lone Wolf. Is it because he's new, or bc he thinks he might have to face Rahm? Or what?

AND we're back...

Tammy Baldwin now introducing amendment.

Baldwin: Thank you for limiting current law that has been employed in violation of Americans' civil liberties. Remember well history that Chair cited yesterday when our Committee's bill was tossed aside. Do have concerns about classification about programs authorized by FISA or NSLs. Whether programs need to be classified as such. Amendment expresses sense of Congress that President should review classification level of programs that use NSLs or authorities under FISA. Amendment makes clear that review should not endanger ongoing investigation. EOs on classification, 13292. This includes systematic declassification review by each agency. My amendment is consistent with these orders. Reaffirms that govt should provide info about these programs as soon as possible. Obama Admin has already taken steps to declassify. Documents from OLC on torture. July spy satellite images, ice melting.

Smith: I don't object to this amendment, considering that NSL provisions have been so weakened, why have this review. Good part of bill.

Conyers: Weakest endorsement this year.

Coble: Introduces amendment striking section requiring public reporting. Declassification belongs to Executive, I don't think we can legally require this. Postpone until necessary input from DOJ.

Conyers: Suggestion, that perhaps if gentleman

would be kind enough to withdraw, we will get immediate meeting with DOJ, and you and me and ranking member to determine if your amendment is the only outcome, if there's no satisfaction to be had from DOJ.

Smith: I'd like to accept your offer, add items, starting with lone wolf.

Conyers: I would add the lone wolf since it was defeated on tie vote.

Sheila Jackson Lee: Introduces humanitarian exemption from criminal material support statute. Want to note for the record that title of reauthorization PATRIOT allows consideration of number of issues including material support. Seeks to limit some of provisions that have diminished privacy. Gentleman from TX, well aware of some of the issues on charitable foundations, does not capture charitable orgs that were using that status for terrorist activity. To address providing humanitarian aide. Currently employees face prison time, should be imposed only on those who mean to support terrorism.

Baldwin: Result is that people do without necessities because humanitarian groups are prohibited under material support provision. Very difficult to provide assistance in Sri Lanka after tsunami without cooperating with Tamil Tigers. I do believe we have to amend underlying language.

Nadler: While I understand humanitarian concerns. Effect would be far from humanitarian. Add food and water to medical supplies. Issues not definition, prohibition to which definition refers. Prohibits from providing resources, knowing or intending they will be used for terrorism related offense. If it's not given with intent that it be used for terrorist act, it's not prohibited.

Smith: Amendment not germane, beyond scope and purpose.

Jackson Lee: Disagree with interpretation of

definition. We have amended roving wiretaps. I believe this is germane. Withdraw amendment. Would like to add this issue to discussion with DOJ.

Bobby Scott agrees to do hearing in Criminal subcommittee.

DWS: Grave concern and personal opposition. This is settled question. Money is fungible, I don't think it would be appropriate or timely.

Jackson Lee: Basis for oppty to explore for factual information.

Rooney: Strike changes make to criminal pen registers and trap and trace devices. Federal criminal code has provided since 1986. Requires specific and articulable facts in statement to Court. Says police opposed.

Quigley: Have law enforcement agencies taking stand against, in form of documents, and put into record?

Rooney: Emails effectuating what was stated.

Quigley: Groups?

Rooney: National DA Assc, Fraternal Order of Police, etc.

Scott: Section 107 would be eliminated by this amendment. Trap and trace does not capture privacy. Under current law, not requirement that explain any facts.

Smith: Support. Strikes changes made. If amendment not adopted, will unduly burden law enforcement.

Rooney: When you talk about standards of proof.

Schiff: Secondary? One that would not have specific and articulable, but do away with presumption?

Rooney: Would consider, would alleviate disparity, that there's some problem with existing law.

Issa: On this side having a hard time finding

that there is a presumption. In this case, writing down license plate numbers. More appropriate equivalent. Trapping relevant association numbers.

Lungren: Hearings on this particular subject?

Scott: Not sure if this came up.

Lungren: Law enforcement technique, law enforcement agencies unanimously oppose change. Far-ranging change in the law.

Schiff: Question to author of amendment is, would the gentleman accept secondary amendment?

Rooney: Without any evidence or proof that current standard being abused, I don't see the need to modify. I'd like amendment to stand on its own.

Johnson: Is it true that when investigation that has not led to indictment.

Scott: Trap and trace pursuant to court order.

Rooney now introducing same amendment wrt FISA trap and trace.

Smith: New standard unnecessary, burdensome to govt.

Jackson Lee: Not enhanced standard, Clearer standard.

Jackson Lee: Public reporting. Achieve President's support for transparency.

Adam Schiff and a top staffer are having fairly intense discussion right in front of Jackson Lee. I wonder what Schiff has coming.

Jackson Lee invoking King assassination in support of greater transparency on PATRIOT.

Smith: Wish Conyers was here, because when Coble strike public reporting on NSL, this amendment would fall under same category. Ask colleague from TX to consider withdrawing, so she and Coble and I can discuss public reporting.

Lungren: Revises standard by which FISA will

review govt cert of nondisclosure of business record. Existing legislation strikes conclusive. Substantial weight rather than no weight at all.

Scott: Under current law when a person receives 215, he cannot challenge for a full year. Court required to reject a challenge. Bill is right to change, too many times under last Admin, abuse of secrecy to hide crimes, torture warrantless surveillance, and whether or not Iraq had WMD. We're right to adjust govt's power. If govt cannot make case maybe it cannot get secrecy order to begin with.

Smith: Support amendment. Incorporates deferential standard more accurately reflects 2nd circuit.

Lungren: Stunned that Chair would talk about torture, this has nothing to do with this. Nondisclosure of business records. Adopting SJC standard.

Schiff: Adopts an appropriate balance.

[Uh, I notice you don't make the same claim about warrantless wiretapping. Is that bc they used these authorities to replace warrantless wiretapping???

Watt: If we were silent. Doe said standard applied was unconstitutional. What standard did they apply?

Lungren: Left it opened, but acknowledged that deference given.

Watt: Court would give deference anyway. In this cases Court gives degree of deference.

Schiff: US v Nixon, used utmost deference. If you go from situation where standard conclusive to no standard, court could infer no added weight. So if we set a standard better than no standard at all.