

CLAPPER: WE NEED TO PASS PATRIOT TO MAKE SURE APPLE CONTINUES TO TRACK YOUR LOCATION

I'm very sympathetic to what Glenn and bma and Spencer and Julian have to say about the stupid fear-mongering around today's PATRIOT extension. Julian's explanation of how the grandfather clause would work is particularly important:

. A lapse of these provisions for a few days—or a few weeks—would have no significant effect. First, they're all covered by a grandfather clause. And contrary to what the *New York Times* implies, that *doesn't* just mean that orders or warrants already issued under these authorities remain in effect. Rather, as the Congressional Research Service explains (using the sunset deadline from prior to a short-term extension):

The grandfather clauses authorize the continued effect of the amendments with respect to investigations that began, or potential offenses that took place, before the provision's sunset date.¹⁰⁸ Thus, for example, if an individual were engaged in international terrorism on the sunset date of February 28, 2011, he would still be considered a "lone wolf" for FISA court orders sought after the provision has expired. Similarly, if an individual is engaged in international terrorism on that

date, he may be the target of a roving wiretap under FISA even after authority for new roving wiretaps has expired.

Got that? Every investigation already in progress at the time of sunset gets to keep using the old powers. Every *new* investigation where the illegal conduct in question began before the sunset date gets to keep using the old powers. Over the span of a few days or weeks, that's going to cover almost every actual investigation. For the tiny number that don't fall into those categories, if there are any at all in the space of a short lapse, investigators will be "limited" to relying on *every other incredibly broad tool* in the Foreign Intelligence Surveillance Act arsenal—with, of course, the option to use plain old criminal investigative authorities as well.

And James Clapper's fearmongering letter—which was liberated by Sam Stein—is particularly absurd on most counts.

I mean, are we supposed to worry that the government can't "conduct timely surveillance on a non-U.S. person 'lone wolf' terrorist such as an individual who has self radicalized and responds to international terrorist calls to attack the United States," when the government has never had a need to use this authority, not even with Khalid Ali-M Aldawsari, who was a "a non-U.S. person 'lone wolf' terrorist such as an individual who has self radicalized and responds to international terrorist calls to attack the United States"?

I mean, if Clapper wants to make bullshit claims, he just encourages us to treat everything he says as bullshit.

That said, I wonder whether the underlying issue

here isn't the explicit powers—the ability to find out about “terrorist [and non-terrorist] purchases of bomb-making chemicals” with Section 215, for example, but instead the secret collection programs. Clapper says,

Important classified collection programs might be forced to shut down, causing us to lose valuable intelligence information that could be used to identify terrorists and disrupt their plots.

After all, we presume the government is collecting geolocation data not through an actual investigation related to an individual suspect and therefore grandfathered in under the terms Julian laid out. We presume the government is playing fast and loose with the word “related to” in Section 215.

And so it's not so much that we'll lose track of Muslims who buy hydrogen peroxide. It's that the corporations being forced (we presume) to turn over geolocation data are going to respond to the very public lapse of PATRIOT and refuse to keep turning that data over.

(In this way, this fearmongering is precisely like the fearmongering used in February 2008 after the Protect America Act expired; the real issue was the complaints of the telecoms who were legally on the line.)

Of course, none of this means anyone ought to cave to the fearmongering. After all, if the legal basis for this collection is so sketchy that it wouldn't qualify for the grandfathering that the real authorities do, the government probably ought not be relying on it, right?

Or maybe Reid is just channeling Dick Cheney because he's anxious to start his long holiday weekend.