WILL BEN WITTES PRE-PROVE BEN WITTES IS NAKED?

Ben Wittes wrote a post about last week's Second Circuit ruling deeming the NSA 215 phone dragnet unlawful, arguing that the ruling is actually good for the Agency.

> It may seem odd to suggest that a unanimous panel defeat on a basic legal theory underlying an NSA program is good for the agency, but consider: A few days ago, the 215 program was on a glide-path to expiration. The House seemed to be coming together around a version of the USA Freedom Act, which would substitute a different metadata acquisition mechanism for the 215 authority and create other reforms as well. But the Senate had lacked the votes to move that bill even last year, and Senator McConnell was pushing instead what he called a "clean" reauthorization—which would reauthorize 215 without modification and do none of the other reforms both the administration and civil libertarians have supported. It was not at all clear that the House bill could pass the Senate, and it was entirely clear that McConnell's bill could not pass the House. Betting on a compromise within three weeks was, given the normal state of congressional competence these days, optimistic, to put it mildly. So the program seemed likely to expire, less as a result of any decision to let it sunset than as the result of a collective action problem.
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> The Second Circuit opinion meaningfully changes that. It is a sharp reminder to those who favor McConnell's approach that is not viable—or, at least, that it

> involves serious litigation risk. Yes, it is possible—likely, even—that the D.C. Circuit will disagree with the Second Circuit, and that the meaning of 215 will thus be ultimately subject to the whimsical mind of Anthony Kennedy. So yes, it's also still possible that a vote for a "clean" reauthorization will yield maximal flexibility for the agency. But that's not a bet I would want to lay if I were a congressional proponent of strong signals intelligence and counterterrorism programs. Rather, I would say that it is far better to have a legally sustainable version of this capacity than to have no capacity at all, and supporting clean reauthorization will either cause there to be no bill—in which case the authority lapses—or, if the bill were to pass, it risks that the Supreme Court's ultimately agrees with the Second Circuit, not with the FISA Court interpretation of the law. The far better approach for the agency is the compromise that the administration has long supported. And for the first time in a long time, I can see a path to that outcome.

While I don't necessarily agree with all details, I think he's right. USA F-ReDux is actually the best outcome for the government. It always has been. But no pro-spying people were making that case, and so even people like Bill Nelson opposed it. Last week's decision prevents the spying hawks from voting against their best interests.

But — particularly given Ben's long campaign to hold people accountable for what they should know — I have to laugh at this bit.

> The litigation risk of relying on 215 is the principal reason I have been arguing for almost two years now that Congress needs to clarify the law, both

> to authorize access to metadata contact chaining under appropriate circumstances and to build in protections that exist under the current program only through court order.

I laugh because, even if it is Congress' intent to "clarify the law … authoriz[ing] access to metadata contact chaining," USA F-ReDux does not do that. On the contrary, for the last 15 months, the actual chaining function being authorized in the bill has been a moving target. The notion that this involved exclusively *contact* chaining was jettisoned, with court approval, in February 2014. And no one I've spoken with knows what the current chaining language (or the previous use of "connection chaining") means.

So Congress is not clarifying things, it is obscuring it, though almost all in Congress (and, apparently, Ben, who unlike most in Congress has been writing about this bill throughout) have missed that this is no longer authorizing just contact chaining. According to Ben, Ben has no excuse for not knowing better, but apparently Ben doesn't, yet.

I remain hopeful there will be some clarifying (and limiting) language added to the actual chaining procedure before it gets passed. If it doesn't, it's unlikely we'll ever hear about it unless someone else decides to risk life in prison to alert Americans to what NSA and FBI are really doing. But if we do learn that what started as defensible "connection chaining" on burner phones morphed under this obscurantist language into something more problematic, I do hope Ben realizes that he, along with almost all of Congress, should have known, from the language of the bill, that it did more than approve contact chaining.