

USA F-REDUX: THE RISKS AHEAD

Sometime after 2 today, the House will pass USA F-ReDux by a large margin. Last night the Rules Committee rejected all amendments, including two (a version of the Massie-Lofgren amendment prohibiting back doors and a Kevin Yoder amendment that would improved ECPA protections) that have majority support in the House.

After the bill passes the House today it will go to the Senate where Mitch McConnell will have his way with it.

What happens in the Senate is anyone's guess.

One reason no one knows what Mitch has planned is because most people haven't figured out what Mitch really wants. I think there are 3 possibilities:

- He actually wants USA F-ReDux with some tweaks (about which more below) and the threat of a straight reauthorization is just a tactic to push through those tweaks; this makes the most sense because USA F-ReDux actually gives the IC things they want and need that they don't currently have
- There is something the government is doing – a bulk IP program, for example – that Mitch and Burr plan to provide Congressional sanction for even while basically adopting USA F-ReDux as a limit on Section

215 (but not other authorities); the problem with this plan is that secret briefings like the Administration offered the Senate, but not the House, last night don't seem to meet the terms of ratification described by the Second Circuit

- The Second Circuit decision threatens another program, such as SPCMA (one basis for Internet chaining involving US persons right now), that the Senate believes it needs to authorize explicitly and that's what the straight reauthorization is about
- [Update] I'm reminded by Harley Geiger that Mitch might just be playing to let 215 sunset so he can create a panic that will let him push through a worse bill. That's possible, but the last time such an atmosphere of panic reigned, after Congress failed to replace Protect American Act in 2008, it worked to reformers' advantage, to the extent that any cosmetic reform can be claimed to be a win.

I think – though am not certain – that it's the

first bullet, though Burr's so-called misstatement the other day makes me wonder. If so Mitch's procedural move is likely to consist of starting with his straight reauthorization but permitting amendments, Patrick Leahy introducing USA F-ReDux as an amendment, Ron Wyden and Rand Paul unsuccessfully pushing some amendments to improve the bill, and Richard Burr adding tweaks to USA F-ReDux that will make it worse. After that, it's not clear how the House will respond.

Which brings me to what I think Burr would want to add.

As I've said before, I think hawks in the Senate would like to have data mandates, rather than the data handshake that Dianne Feinstein keeps talking about. While last year bill supporters – including corporate backers – suggested that would kill the bill, I wonder whether everyone has grown inured to the idea of data retention, given that they've been silent about the data handshake since November.

I also suspect the IC would like to extend the CDR authority to non-terrorism functions, even including drug targets (because they probably were already using it as such).

The Senate may try to tweak the Specific Selection Term language to broaden it, but it's already very very permissive.

I'm also wondering if the Senate will introduce language undermining the limiting language HJC put in its report.

Those are the predictable additions Burr might want. There are surely a slew more (and there will be very little time to review it to figure out the intent behind what they add).

The two big questions there are 1) are any of those things significant enough to get the House to kill it if and when it gets the bill back and 2) will the House get that chance at all?