

MITCH MCCONNELL AND RICHARD BURR'S AUTHORITARIAN POWER GRAB FAILS

Last night, Mitch McConnell dealt himself a humiliating defeat. As I correctly predicted a month before events played out, McConnell tried to create a panic that would permit him and Richard Burr to demand changes – including iMessage retention, among other things – to USA F-ReDux. That is, in fact, what Mitch attempted to do, as is evident from the authoritarian power grab Burr released around 8:30 last night (that is, technically *after* the Administration had already missed the FISA Court deadline to renew the dragnet).

Contrary to a lot of absolutely horrible reporting on Burr's bill, it does not actually resemble USA F-ReDux.

As I laid out here, it would start by gutting ECPA, such that the FBI could resume using NSLs to do the bulky Internet collection that moved to Section 215 production in 2009.

It also vastly expanded the application of the call record function (which it very explicitly applied to electronic communications providers, meaning it would include all Internet production, though that is probably what USA F-ReDux does implicitly), such that it could be used against Americans for any counterterrorism *or* counterintelligence (which includes leaks and cybersecurity) function, and for foreigners (which would chain onto Americans) for any foreign intelligence purpose. The chaining function includes the same vague language from USA F-ReDux which, in the absence of the limiting language in the House Judiciary Committee bill report, probably lets the government chain on session identifying information (like location and cookies, but

possibly even things like address books) to do pattern analysis on providers' data. Plus, the bill might even permit the *government* to do this chaining in provider data, because it doesn't define a key "permit access" term.

Burr's bill applies EO 12333 minimization procedures (and notice), not the stronger Section 215 ones Congress mandated in 2006; while USA F-ReDux data will already be shared far more widely than it is now, this would ensure that no defendant ever gets to challenge this collection. It imposes a 3-year data retention mandate (which would be a significant new burden on both Verizon and Apple). It appears to flip the amicus provision on its head, such that if Verizon or Apple challenged retention or any other part of the program, the FISC could provide a lawyer for the tech companies and tell that lawyer to fight for retention. And in the *piece de la resistance*, the bill creates its very own Espionage Act imposing 10 year prison terms for anyone who reveals precisely what's happening in this expanded querying function at providers.

It is, in short, the forced-deputization of the nation's communications providers to conduct EO 12333 spying on Americans within America.

Had Mitch had his way, after both USA F-ReDux and his 2-month straight reauthorization failed to get cloture, he would have asked for a week extension, during which the House would have been forced to come back to work and accept – under threat of "going dark" – some of the things demanded in Burr's bill.

It didn't work out.

Sure, both USA F-ReDux (57-42) and the short-term reauthorization (45-54) failed cloture votes.

But as it was, USA F-ReDux had far more support than the short-term reauthorization. Both McConnell and Rand Paul voted against both, for very different reasons. The difference in the vote results, however, was that Joe Donnelly

(D), Jeff Flake (R), Ron Johnson (R), James Lankford (R), Bill Nelson (D), Tim Scott (R), and Dan Sullivan (R) voted yes to both. McConnell's preferred option didn't even get a majority of the vote, because he lost a chunk of his members.

Then McConnell played the hand he believed would give himself and Burr leverage. The plan – as I stated – was to get a very short term reauthorization passed and in that period force through changes with the House (never mind that permitting that to happen might have cost Boehner his Speakership, that's what McConnell and Burr had in mind).

First, McConnell asked for unanimous consent to pass an extension to June 8. (h/t joanneleon for making the clip) But Paul, reminding that this country's founders opposed General Warrants and demanding 2 majority vote amendments, objected. McConnell then asked for a June 5 extension, to which Ron Wyden objected. McConnell asked for an extension to June 3. Martin Heinrich objected. McConnell asked for an extension to June 2. Paul objected.

McConnell's bid failed. And he ultimately scheduled the Senate to return on Sunday afternoon, May 31.

By far the most likely outcome at this point is that enough Senators – likely candidates are Mark Kirk, Angus King, John McCain, Joni Ernst, or Susan Collins – flip their vote on USA F-ReDux, which will then be rushed to President Obama just hours before Section 215 (and with it, Lone Wolf and Roving Wiretaps) expires on June 1. But even that (because of when McConnell scheduled it) probably requires Paul to agree to an immediate vote.

But if not, it won't be the immediate end of the world.

On this issue, too, the reporting has been horrible, even to almost universal misrepresentation of what Jim Comey said about the importance of expiring provisions – I've

laid out what he really said and what it means here. Comey cares first and foremost about the *other* Section 215 uses, almost surely the bulky Internet collection that moved there in 2009. But those orders, because they're tied to existing investigations (of presumably more focused subject than the standing counterterrorism investigation to justify the phone dragnet), they will be grand-fathered at least until whatever expiration date they have hits, if not longer. So FBI will be anxious to restore that authority (or move it back to NSLs as Burr's bill would do), especially since unlike the phone dragnet, there aren't other ways to get the data. But there's some time left to do that.

Comey also said the Roving Wiretap is critical. I'm guessing that's because they use it to target things like Tor relays. But if that's the primary secretly redefined function, they likely have learned enough about the Tor relays they're parked on to get individual warrants. And here, too, the FBI likely won't have to detask until expiration days on these FISA orders come due.

As for the phone dragnet and the Lone Wolf? Those are less urgent, according to Comey.

Now, that might help the Republicans who want to jam through some of Burr's demands, since most moderate reformers assume the phone dragnet is the most important function that expires. Except that McConnell and others have spent so long pretending that this is about a phone dragnet that in truth doesn't really work, that skittish Republicans are likely to want to appear to do all they can to keep the phone dragnet afloat.

As I said, the most likely outcome is that a number of people flip their vote and help pass USA F-ReDux.

But as with last night's "debate," no one really knows for sure.