PATRIOT AND STATE SECRETS MARK-UP, 2.1

We’re back, waiting to get a quorum. Watch along here.

Schiff: Strike ordinary pen register and trap and trace changes. Follow-up to Rooney amendment, potential unintended consequences on changing trap and trace. Avoid unintended consequences.

Smith: Strikes higher standard for pen register and adds audit.

Schiff: Yes. Calls for same audit in one context extended to FISA and criminal context.

Smith: Improves bill, not to extent we can support bill.

Passed on voice vote.

Issa: Strike section 106. Sneak and peek. Existing bill limits judges discretion in granting permission for delayed notice. Imposes standard which shall not be achieved.

[This is being held for the moment, now moving to State Secrets]

Resolution of inquiry from Lamar Smith on Medical Malpractice.

Nadler: State Secrets. Uniform standards for state secrets. In order for rule of law to have any meaning, must have recourse in court. If wiretaps your phone, steals your gun, kidnaps and tortures you, only remedy is to sue the govt. If exec can have any case dismissed on any incantation of state secrets, not simply excuse to shield illegal or embarrassing information. There can be no law, no rights and no liberty if exec can do anything it wants behind wall of state secrecy.Holder policy welcome, but not enough. Internal policing, but still permits exec to be its own judge. Congress has provided guidance to courts on handing sensitive info in

other contexts. Several witnesses who have submitted evidence, courts have proven themselves fully competent, that is Courts best qualified to balance risks of disclosing evidence. Only govt interlocutory appeal. Prohibits dismissal at outset. Would require Court to rule on actual, not hypothetical harm. Requires all judges review info to determine whether harm is likely to occur. Currently each judge decides whether to review or whether to accept govt's assertions. If judge determines privilege has been asserted, consider substitute. Where no possible substitute, allows dismissing or finding for or against. Modeled on CIPA. Same type of flexibility in civil cases as in criminal cases. Courts, find balance.

Sensenbrenner: State secrets long-standing. SCOTUS most recently described in Reynolds. May occasionally disprivilege someone suing in court important to protect all Americans. Obama Administration not enamoured with this legislation.

[Shorter Jim Sensenbrenner: I'm as fond of Democrats abusing power as I am of Republicans doing so.]

Conyers: Want to thank Gentleman for research in which he has allied the current president with the past president.

Nadler: Sensenbrenner helped make the case for this bill. Kennedy: "District Court will use discretion" to protect valid state secrets. Yes. That's the point of this bill. Many courts will use discretion. Many courts will say we won't look at it. What this bill says is you have to look at it. Court should do exactly what J Kennedy said, and assess validity of state secrets. Also said we use deference, with FOIA is to obtain public disclosure. Has resulted in abject deference. In civil cases, the goal is the suit isn't public disclosure. Alleging injury. Greater constitutional concern. Should not require undue deference. Yes, we must protect state secrets if validly asserted. We know that govt in Pentagon Paper said sky would

fall. Reynolds case, establishing state secrets, govt lied to Court. In fact, when became public, nothing to do with that. Air force negligence. Even if state secrets had constitutional origins. Until Bush Admin, ss used only to say you can't see that doc. Under Bush, sadly supported by Obama Admin in court, new use, move to dismiss case, right after first pleading, on grounds that consideration will result in revelation of ss. Not evidentiary protection, but use of doctrine to preclude consideration at all. This bill says you can't do that. What that means is they're not protecting state secrets. Govt can do ANYTHING to you. Can violate second amendment. When you sue them to say stop, they say, you can't consider the case. SO you can't get into Court. It may be that SCOTUS will say you can't do that. Unfortunate that Obama Admin taking same position. THey haven't taken it publicly. So for those reason urge to support bill.

Smith. Join Obama Admin in opposing bill. Obama has resstated state secrets four times. Serves essential purpose of protecting secrets. Leahy just monitoring Admin's policy.

Back to PATRIOT:

Issa: Will and may language (this is a compromise that will likely go through on voice vote).

Bill passes 16-10.

Back to State Secrets.

Nadler Amendment: 3 technical changes. First stream-lines process for attys w/clearances. Clarify aspects of what happens after Court determines ss valid or no. Court issues orders if ss does not apply.

[Good for Nadler–he's putting in requirements to give atty clearance or appoint one who has it]

Goodlatte: Support amendment, not bill.

Schiff: No guidance on how to evaluate testimony of govt versus other witnesses. In Senate leg

include substantial weight standard. Provide that govt’s assertion of harm be given due deference. Will facilitate court in understanding whether witness possess broadest possible information on disclosure of state secrets.

Nadler: Secondary amendment. The whole point, we’re asking court to judge whether govt’s assertion is valid or not. Has to be hearing. Secret in camera hearing in front of judge. Due deference. Putting thumb on scale. In FOIA, you rarely see judge disagree with govt. Govt here not disinterested party, govt has allegedly wronged someone.

Lungren: Rise in support of Schiff amendment. SCOTUS has said clearly that a claim of privilege on ground that info constitutes diplomatic secrets necessarily Article II. Constitution gives deference. US Constitution does that.

Lungren now quoting Navy v. Egan without noting that it allows for Congressional limitations.

Nadler: Egan recognizes broad authority. Unless Congress has provided otherwise.

Thank you Nadler. I like when the lawyers come in and defend my slapdown of stupid Republicans channeling David Addington.

Nadler: Bill says court shall weigh in same manner. Schiff takes out and subs “due deference.” Secondary would put back in, weigh in same manner, in making such an assessment, as supported by material reviewed under section b1. So long as supported by something in record.

Delahunt: Recommends Nadler removes secondary amendment and opposes Schiff. I think we have learned that executive power should be limited. We’ve had significant difficulty receiving from exec collaboration necessary for effective oversight. It’s time to reassert the Constitutional authority of US Congress, task judiciary with its obligations under the constitution and not continue this abject

deference to the executive. They will make the case as to the need to the assertion of the privilege. Do not want to see continued trend toward unfettered exec power.

Gohmert: Agree respect from CA. Regarding part where he said due deference borders on irrefutable. Doesn't mean irrefutable. Due diligence means due deference.

Delahunt: Judges will interpret to give credence to what may irrebutable. Tell the courts that they have obligation as separate order of govt. If we are going to have a system of checks and balances everyone has to do their part.

Gohmert: some experts think constitution ought to be scrapped.

[You ignorant fucker, the constitution requires separation of powers. YOU'RE the one ignoring the Constitution]

Schiff: Constitutional core, some Article II power, to say revelation would be so injurious that exec can preclude that.

Gohmert: Both sides of aisle, administrations claiming privileges they shouldn't have. Should not be irrefutable.

Jackson Lee: This amendment skews balance. Article III courts give deference.

Gohmert: If we vote it down, courts can look at legislative history.

Schiff amendment fails 13-17.

Schiff:

Nadler: Compromise?

Schiff amendment does something with which attorneys.

WOOT!! We have a state secrets bill. 18-12 vote, with just Schiff crossing aisle to vote against.

PATRIOT AND STATE SECRETS MARK-UP, DAY TWO

Liveblog from today's HJC hearing on PATRIOT reauthorization and State Secrets.

PATRIOTS AND SECRETS HEARING, DAY ONE WRAP UP

The Democrats in the House Judiciary Committee sure looked more like Democrats in Wednesday's PATRIOT Act hearing than most Democrats on the Senate side.

PATRIOTS AND STATE SECRETS MARK-UP TWO

Follow along at home here.

Dan Lungren: NSL minimization. Deals with section of bill bc they did it on the Senate side. Strikes 2008 which calls for establishment of minimization procedures obtained pursuant to NSLs. If there are tangible problems that have arisen, let's create new procedures. Problem is we're trying to apply concept of minimization in NSL context. Can't use electronic surveillance and apply to NSLs. Square peg round hole. Not content of communication. Contrast to electronic

surveillance. Generally note an expectation of privacy that a communication occurred, rather than communication itself. I'm talking about entry in phonebook. We will have chaotic consequences. I know some don't like NSLs. Much like criminal cases where GJ subpoenas can be used for duration of investigation. Must be available to national security. It seems at least strange that we would have higher degree of proof higher bar dealing in terrorist context. Requirement of destruction of early building blocks will lead to more intrusive means. I think minimization inapplicable to NSLs. As far as I can find from anything we received from Admin, no support. Leahy received letter from DOJ. Found nothing that says Admin believes this is necessary.

[Since when do Congressmen refuse to legislate until the President tells them to? He's pretending he can't accept an amendment unless the President tells him to. Let's hope that stance carries over to health care.]

Conyers: I think your efforts are good faith. Procedures reasonably designed to minimize the acquisition and retention of non-publicly available info regarding unconsenting US persons. These minimization procedures ensuring that non-public info during nat sec investigations regarding innocent American persons not disclosed by law enforcement. Privacy experts and DOJ acknowledged need for these types of guidelines. Not dreamed up by our distinguished colleagues. Managers amendment accounts more accurately for how it can be used. Only for minimization procedures reasonably designed in light of NSL. Directs AG to submit procedures to Congress. I'm hoping we can go along with refining minimization procedures that already exist.

Lungren: Realize DOJ refining procedures wrt NSL. Unaware of DOJ either suggestion or consideration of applying minimization reqts to NSLs as part of good faith effort to refine NSL.

Conyers: We've been working together. If I had a

letter that would address this to your satisfaction. They know what we're doing and why we're doing it. We have not encountered any objection to what is embodied in manager's amendment.

Lungren: First I heard DOJ had not raised any objections. My understanding they thought this was an inappropriate transfer of process used in electronic realm to this.

Conyers: I've got an idea I'd like to present to you afterwards that would make you more comfortable.

Smith: Support this amendment. Minimization will only burden FBI with unnecessary procedural impediments. Oh, and we should have had a hearing.

Conyers: I have a page full of hearings that we have had. To you and perhaps others they were insufficient and I apologize for that. Btw we did not receive any notice of what your amendments were. I don't know what other amendments are coming.

Chaffetz: I appreciate you on the great pronunciation on my name. Strikes 204 that require govt to, in addition to NSL, document specific and articulable facts that pertains to foreign power or agent of foreign power. Allows info to be sought not just if it pertains to agent of foreign power. A backdoor attempt to roll back standards for NSLs. Previously Congress did away with specific and articulable facts. Congress refused to return to that standard.

[Chaffetz was just playing dumb, claims he didn't know what happened before. All of a sudden he's lecturing about what has gone before.]

Chaffetz: How can we limit when we know it relates to agent of foreign power.

Nadler: Rise in opposition. We have sought to properly balance considerations of national

security and personal liberty. NSL issued without any court. Should be held to a higher standard than 215 business records order. Have to be reasonable and articulable facts, to show grounds to believe relates to foreign power, or agent of foreign power, or pertains to indiv in contact with. If you cant' show it relates to a terrorist, you should not be getting this. Relevant to an investigation is a 215 order, which requires court approval. If you can't show that it is related to a terrorist, go to a court and at least get an order. So we provided for both those contigencies, in a way that is more protective of privacy. What this seeks to go back to is essentially the current law, which has led to many abuses.

Smith: Support this amendment. In 2001 and 2005 we specifically reject need to have specific and articulable facts. Nothing has changed.

Conyers: At least one IG report, talking about abuses with NSLs. I will put into record. It is what has changed that we have been able to document that has led us to write managers amendment in this way.

Issa: Majority may choose not to support amendment. Record keeping related. I certainly think we can find a way to sanction those who do not keep records. Justify, if not this amendment, where would be not curtail legitimate use of, for example, a plot to put liquid homemade plots in Britain. Do we tie hands here to follow-up to see if there are similar activities? Would the Chair speak to base text still enabling appropriate use is that what you're doing we're going to cut off the tool.

Conyers:All we're doing is requiring they go to Court.

Issa: If then they should go to Court.

Nadler: I'm confused about what your question was. What I tried to say before is that we're establishing two standards. 215, to do that need to get court order. Higher standard to look at similar records w/o court order. I'm not saying

requiring court order but with lower standard you would require court order.

Issa: I would yield to the guy who has actually headed up investigations, Lungren?

Lungren: Sloppy record keeping. If you look at IG report. They didn't find any evidence of mal-intent, every indication is that taht has changed.

[What about the time when FBI tried to do something improper with 215 and then did it with NSL instead, after Court had said not.]

Issa: We've had the change, old admin, to new admin, negating any reason for this amendment.

Conyers: You didn't intentionally intend to stir up ordinary…

Issa: I think he was saying I was replacement for Bob Barr. With ACLU and NRA, making it as good as it could be. Wanting to get back to what we voted out of this bill.

Nadler: Gentlmen from CA talking about record-keeping abuses. I'll give you a few. Documents including social security and DOB records irrelevant to investigation. University records from university. Full credit reports when full credit reports only in counter terrorism cases. In a couple of instances after FISA court denied record based on First Amendment concerns, the FBI simply went around Court, circumventing Court's oversight, despite fact that NSLs subject to First Amendment cases. These are some of the things we're trying to get at. Need strong oversight. Craft bill to put appropriate limits while permitting necessary investigations.

Chaffetz (?): In those three examples.moved outside of the law, doesn't mean law was wrong.

Nadler: We disagree on that.

Issa (I think) blares into mike, Conyers chides him for it.

Schiff: Makes changes to Section 215. May be

used to order any tangible thing. Should not be used lightly. Orders reviewed by FISA Court, presumptively relevant. Bill before Committee leaves before presumption, govt must show specific and articulable facs. Admin has expressed concern that this would impact intelligence activities. Remove specific and articulable facts, but no longer presumption. Require report to Congress in six months about better ways to collect.

[This would put this in line with the SJC, except that it instructs Admin to go find better way to collect this info]

Quigley: Discussions with DOJ?

Schiff: DOJ hasn't given definitive answer. The Amendment addresses concerns raised by Admin. Admin would be more inclined to support than the provisions that it amends.

Quigley: I'll support this amendment, do hope that the DOJ graces with their opinions on this. Critical decisions. I understand SJC already had markup without DOJ veiws. Need to let us know what their views are.

[Note Quigley asked about DOJ views, but Schiff answered that feedback came from Obama Administration]

Smith: Another reason we might have a hearing. Amendment an improvement.

Smith: How can we protect civil liberties when we don't know how civil liberties affects these intrusions?

Conyers: Schiff wrt business records that we strike specific and articulable fact standard replace with language reported on bipartisan basis in Senate. Doing what has been done in Senate. So what we're trying to do is direct govt submit to court statement relied upon by applicant that info sought is relevant to authorized anti-terrorism investigation. Eliminate presumption of relevance that is currently in the law. Not a matter of making it

more complicated, being much more specific about it. Reason this enjoys bicameral support, we're eliminating presumption of relevance. Ask that it be specifically articulated. Submit report to House and Senate committees on ways that ongoing operations can enhance civil liberties, within six month period.

Schiff: Exactly right. In response to ranking member, not wanting to force govt to disclose facts in court, 215 orders approved by FISA. I would hope, and expect, that when it makes 215 requests, does make showing of why relevance. I would hope not relying on presumption. No jeopardy that it be disclosed.

Lungren: Amendment to amendment. Members will recall various briefings we have had. Centrality of this section of the law to various programs proven very successful in fight against terrorism. Difference between requiring specific and articulable versus using standard of relevance at this stage of program or programs or whatever we want to call them, if we revert back to specific and articulable, it would deny us many of the dots that we need to connect as we were told by 9/11 Commission. Gentleman's amendment retains relevant standard. Requires statement of facts relied upon. However, my amendment would strike lines 7 through 10, which is the section where he removes presumption that goes in favor of whatever agency making application. What evidence is there that there has been any abuse. Why ought there not be a presumption? [his voice is rising] As has been expressed, concern that when remove presumption, telling the court that we want different standard. No evidence in hearings we had..

[WAit, you said you had no briefings or hearings? Now you remember hearings?]

Lungren: Limited by what we can say publicly. Find one example of an abuse. One of the key areas of the PATRIOT Act, why didn't you collect the dots bc of the way the law was written inability to access the kind of information we're talking about here. Gentleman said look,

that should be higher standard, you have courts review it. FISA Cout has done an exceptional job. Why run the risk of changing the standard that may cause the court to change its analysis. If we're acting to tell them past practice is based on presumption.

That is the danger that we have here. We had a problem with 9/11, attempted to address it. Know of programs about which we've been briefed for which this works very well, running a risk of sending a message to the Court that we want something different than what you've approved in the past.

Conyers: What you're doing is striking specific and articulable facts and taking away presumptive relevance.

Schiff: We are removing specific and articulable and also removing presumption. Two things. Contrary to what my colleague said, we are not changing standard. By removing specific and articulable. Removing presumption. Standard remains the same, not going to presume that something is relevant. THey should be showing relevance. WRT never been problem, I would beg to differ, it's not something we can or should discuss here, have had public hearings, I would not represent no probs with 215. Govt should not be asking if cannot show relevance. I dont' think showing relevance would impede any program that is ongoing.

PATRIOTS AND STATE SECRETS LIVE BLOG

Go here to watch the live stream of the House Judiciary Committee mark-up of the PATRIOT Act renewal and a new bill on State Secrets. Right now they're in a quorum call, with very few Dems present. (16 members present–I guess no one much

cares about this stuff??)

Conyers starting out attacking abuses, mentions hospital confrontation, hundreds of thousands of NSLs against innocent Americans. IG reports criticizing NSL letters. Expect a new report on exigent letters, even more abusive. Executive shield its actions behind veil of secrecy and over classification. Important that power to classify not be used to hide government abuses. Fine lines that we're working between collectively. Real opportunity to bring about better balance. PATRIOT bill before us accomplishes that, preserves govt power where it's needed most, reins in most problematic aspects of existing law. 3 critical changes. Overbroad standards on NSLs and business records. Govt no longer be able to demand information by claiming relevant to nat security. Instead govt must have concrete facts showing it is connected to terrorist or terrorist activity, or foreign agent. If govt lacks such evidence, can still seek for info needed to protect national security, but under supervision of a judge. Allows lone wolf provision to expire.

Lamar Smith: Misguided criticisms of these provisions have continued. PATRIOT Acts Amendment Act introduced. Obama Admin has asked for renewal. Upset no public hearing. [Um, there WAS a hearing, you moron.] Republicans had a forum yesterday and invited security experts to attend. One of our witnesses said we cannot connect the dots unless we first collect the dots. If you get rid of lone wolf, all AQ has to do is disavow AQ and then we can't detect him. [So why'd you tell them, moron?] Prohibits obtaining records of libraries or book sellers. Safe haven to study bomb-making. PATRIOT already provides protection for library records. Also makes changes to NSLs. Only used in national security investigations to protect American lives. Not a coincidence that we have not had another attack. Direct result of using tools Congress gave. Rather than alter legislation that has proved successful at saving lives.

That’s what the President wants, that’s what DOJ wants, that’s what FBI wants.

Nadler: Vital that law enforcement have tools it needs. PATRIOT went too far. As is often case, passion get the better of Congress. Too much unchecked power. Bill will strength PATRIOT, allowing us to protect civil liberties and national security. NSLs existed before PATRIOT. PATRIOT increased unchecked ability to use NSLs, use and misuse rose dramatically. FBI collected personal information. Lost records that were collected. Gag orders, have been declared unconstitutional. Have introduced leg to curb abuses. Would raise standards on NSLs, specific and articulable facts. Only pertaining to terrorists. Not for fishing expeditions. Burden on govt on nondisclosure. This bill would require minimization. No reason for govt to amass information about millions of innocent people. With enactment Americans remain safe.

Sensenbrenner: Here we go again. Lot of hyperbole and very little fact. I was author of PATRIOT in 2001. And also reauthorization in 2005. In 2001 PATRIOT gave law enforcement 16 expanded authorities. I had 13 hearings, contrasted to none before this hearing. Reauthorization had a lot of protections, other side of the aisle voted against those measures. Many of those complaining loudly today voted against that amendment. White House and AG have called for extension. That’s YOUR Administration, not our Administration. [Funny, I thought Obama was President of all Americans] Not one of them found unconstitutional. Unconstitutional holding has been around for a long time. This has not been gross assault on civil liberties that people have claimed ti to be. 8 years to litigate. We should not arrogate to ourselves position of judges, while discussing whether to extend it.

Conyers: Managers amendment. Strike 102, insert following: 101: Roving wiretaps,

Conyers interrupts.

Conyers: One small piece of history. Many who were not on the committee. Amendment that PATRIOT that we passed out unanimously thanks to Sensenbrenner, me, and Smith, early hours of morning in rules committee, entire measure was substituted. This measure of this importance, left us dumbfounded, only two copies present when it was debated on floor. More than two weeks have passed. Discussions ad nauseum. Discussed with Admin, DOJ, and other outside authority. A small number of clarifications and adjustments. This is not a repeal of the PATRTIOT Act. Several respond to issues identified by Admin and others on this committee. 3 major considerations. NSLs. It is time that we think through this and tighten the standards for issuance of NSLs requiring for the first time concrete connection to terrorist suspects or foreign agents. I don't think this is asking too much. Amendment clarifies and better specifies types of connections. Also includes requirement for detailed annual reporting on use of NSLs. Other large considerations libraries and booksellers. Cannot use PATRIOT to fish through library and bookseller accounts. Clarify case of companies that sell books and much more–WalMart is classic example. They sell books, other things, and guns as well. Only books protected. Address concern that providing heightened protection for libraries safe haven for those who would do harm to us. Can obtain protected information if it can make case for heightened showing connected to terrorism or foreign agent. A few technical clarifications. Include adjustments to provision on minimizing information regarding US Persons collected under FISA and rules for using NSL info in criminal cases.

Smith: For each problem this managers amendment solves, corrects a new one. Corrects drafting error in provision. Underlying limits all FISA to single target. Unworkable bc FISA allows foreign powers. Amendment corrects just wiretap provision and not all electronic surveillance. Bill as introduced prohibition for library and book seller business records. Specific and

articulable facts, but no evidence of abuse. Neither change are warranted or good policy. All Al Qaeda needs to do now is open a bookstore. Local police regularly use trap and trace in criminal cases. Minimization unworkable and impractible. Pen registers and trap and trace merely request phone numbers. Because no content, minimization makes no sense. What is there to oppose?

[That’s totally disingenuous. They’re using this data for network analysis]

Quigley: I would ask members of committee to consider as a freshman, we don’t have institutional memory that ranking member, Nadler, have. Critical importance, which is our job. Justice Department has, besides references of concerns on this matter. Hasn’t spoken specifically about how they would support or not support this. Concerns besides general fear or litigation. Makes reasonable decision about this difficult. It makes it more difficult. On other hand, Sensenbrenner express some concerns with problems with NSLs. I’d love to hear what you perceive those problems were. That makes the decisions we make today all the more difficult. Final point. Much of what we were briefed in some sessions was in executive session. I’m not sure what I can share with my staff.

Smith: Good questions. We should have had a hearing.

Quigley: Justice and others and agencies channeling concerns through, I know we’ve had discussions. I’m expressing my concern that after the fact review of what we’ve done.

Sensenbrenner: Chair in favor of amendment gave history lesson. Here’s the rest of the lesson. Substitute amendment was result of negotiations with other body. Controlled by Democrats. It’s somewhat of an anomaly that Republican controlled house more sympathetic to civil liberties. This amendment ends up hamstringing local law enforcement on pen register and trap and trace to figure out who is using both

telephones and other devices. Not something that impacts only federal law enforcement. Ought to think twice about doing that bc we don't like the word "PATRIOT." Not one finding of unconstitionality.

Nadler: Don't want to trace history of PATRIOT. Suffice it to say people on this side of the aisle who were never happy with what we did. 2005 improved, but did not improve sufficiently. I will say that the judiciary committee has followed thorough process. 2 weeks available. 2 hearings on PATRIOT, September senior DOJ. Last Congress 8 hearings. At least four bipartisan briefings. 13 highly detailed on uses and misuses of expiring provisions. Amendments seeks to make balanced amendments. They don't open up the libraries to say AQ can do anything it wants if it opens up a bookstore. Managed ability to do two things. Privacy in what you read, exception when national security requires it. Relevant to authorized investigation and relevant to specific terrorist or organization.

Conyers: I've heard at least two members talk about AQ buying a bookstore and being exempt from PATRIOT. How amusing. It's against the law for any AQ person to engage in any activity, period. Not just buying bookstore but opening fruit market. Go to FISA court and bust them immediately. Don't have to buy bookstore for them to operate openly. Let's have a serious, not a comic description. If you know an illegal terrorist, let's turn him in, we don't have to wait for him to buy a bookstore.

Smith: It's also illegal for a terrorist to fly into tall buildings. Could use bookstore to get literature and computers.

Nadler: Anybody can do anything. The question is what level of knowledge or suspicion for govt to invade your privacy if they think you're AQ? Proper debate is appropriate level.

Boo.

Yeah.

Chaffetz (?): As a freshman, concern taht we didn't have a legislative committee hearing on this. At subcommitee. It would have been appropriate to have legislative hearing. I'd like to know where Admin stands formally. It is an important part to understand how we got to this position. I would associate myself with Quigley. I do think it, it doesn't take that long to go through it.

Nadler: The second point. Hearing in subcommitee. I'd say for your info, as far as I know, Admin has not taken formal position pro or con.

Chaffetz: It would be helpful if Admin had taken formal position.

Nadler: Will inform gentleman that I asked Admin over months to give us opinions. They were not prepared to do so. Until two weeks ago, DAG Whitten who testified at SC on this. Talked about pros and cons.

Watt: Most salient recollection, what led to PATRIOT in first place. You talk about flying by seat of your pants. Predicament that members of judiciary were in. "It was teh finest hour because Bob Barr was on the committee, … a libertarian, someone on your side that pays attention to constitutional prerogatives." We couldn't get the Administration then to take positions. This admin has followed the last Admin. They wanted us to give them more power, as soon as they got as much as they could get from us, they went to Rules and Senate and asked for more. Well, if AG Ashcroft is protecting me from terrorists, who's protecting me from AG Ashcroft?

Chaffetz (?): The Bob Barr you're talking about is the ACLU lawyer?

Watt: He wasn't an ACLU lawyer then. I long for the day that somebody on your side of the aisle and remember that it was you that stood for individual rights at one point in your party's history.

Gallegly: 215, FISA may issue order for library and bookstore records only in limited circumstances. The mgrs amendment is an improvement over original bill. Still imposes heightened standards for attaining library records. Why amending use of business records for libraries. Is this authority being abused? Is DOJ using it to monitor activities to innocent Americans. Answer is no.

Nadler: Oppose this amendment, urge all members to oppose. Would remove protections of privacy of people that go to bookstores, govt can still get info when they really need it. If it's not tied to terrorism or foreign power, then it's a fishing expedition and frankly they have no business getting it. There's no legitimate reason that the govt needs that information.

Gallegy: Don't have benefit of longstanding legal credentials. Requires order by court, makes based on request from FBI or NSA.

Nadler: Requiring an order of the court is not the key. Key is what you have to show the court, if you have to show court very little, it doesn't protect you. If there are no reasonable facts to believe it has to do with authorized investigation, no reason to get it.

Gallegy: Still requires what it would require in GJ subpoena.

Nadler: GJ you don't normally subpoena what somebody was reading. The question is should the govt have to show some reason to believe relevant to authorized investigation. We say yes, your amendment says no.

Smith: Support amendment. These records already have additional protections under existing law. No such heightened standard for GJ. Why should terrorist receive greater protections.

[You asshole, if you KNOW they're terrorists, then you've reached Nadler's standard!!!]

Good for Schiff and DWS–I was worried that they might vote against civil liberties and they

voted in favor of them.

[Recess for votes on the House floor]

WHAT HAPPENED TO ZAZI'S BEAUTY PRODUCT PURCHASING ASSOCIATES?

What ever happened to the three Zazi associates who bought certain hair care products this summer? Has the FBI started nosing around in their life? And have they been determined to be innocent?

HJC SCHEDULES ITS "GET DEMOCRATS TO CAVE ON PATRIOT" HEARING

The House Judiciary Committee has scheduled a classified hearing on the PATRIOT Act on Thursday. Will the House Dems cave the same way the Senate Dems did after such a classified hearing?

OBAMA'S OTHER SESSIONS AMENDMENTS

In my last post, I described how the Obama Administration had gotten Jefferson Beauregard Sessions III to introduce an amendment to the PATRIOT Act essentially gutting minimization in the case of pen registers and trap and trace devices. This means they can bulk collect your communication information, find out who you communicate with and for how long, keep that information, and distribute that information, unless a judge "in extraordinary circumstances" tells the government they can't do so. If you haven't read that post go do so.

Since that was such a stinker, I figured I ought to figure out what else the Obama Administration had snuck in under cover of the loathsome Sessions' skirts.

There are basically two other amendments. As I explained, DiFi's substitute for the PATRIOT renewal made Section 215 worse by requiring an applicant to show only some cockamamie theory on how the records are relevant to international intelligence; the judge doesn't get to determine whether that theory makes sense or not. But DiFi (with the help of Pat Leahy) put in an exception for librarians, because librarians have a way of getting pissy when the government starts conducting fishing expeditions. One of Sessions' amendments limits that exception to circulation records and patron data, presumably making it clear that the government can do the same kind of data mining on library computers as they do on every other computer.

The other amendment—which apparently was submitted in two amendments that are virtually identical (one, two)—plays a nice trick with NSL gag orders. As a reminder, NSLs are subpoenas that require no judicial review. The Special Agent in Charge of an FBI office can approve them, based on a statement that shows an agent's cockamamie theory relating the desired records

to an international intelligence investigation. With that subpoena, the agent can get certain kinds of financial records under a gag order.

Now, you may recall that courts around the country have found that gag order to be unconstitutional. So, presumably to fix a Constitutional deficiency, DiFi added language that would have required the FBI to tell financial institutions when the gag order was no longer necessary. For each class of financial provider in question, the bill included language like this:

> (4) TERMINATION.—If the facts supporting a nondisclosure requirement cease to exist, an appropriate official of the Federal Bureau of Investigation shall promptly notify the wire or electronic service provider, or officer, employee, or agent thereof, subject to the nondisclosure requirement that the nondisclosure requirement is no longer in effect.

That is, DiFi's version of the bill basically said, "when you no longer need a gag order (either because you've indicted the person in question or you've determined the person is totally innocent, you've got to tell the service provider that the gag order is no longer in place, and if the service provider feels like it, they can tell their customer." ~~Sessions'~~ Obama's amendment effectively changes that to say:

> (4) TERMINATION.—In the case of any request for which a recipient has submitted a notification under paragraph (3)(B), if the facts supporting a nondisclosure requirement cease to exist, an appropriate official of the Federal Bureau of Investigation shall promptly notify the wire or electronic service provider, or officer, employee, or agent thereof, subject to the nondisclosure requirement that the

> nondisclosure requirement is no longer in effect.

That “submit a notification” refers to the process by which providers legally challenge gag orders. That means that the FBI only has to tell a service provider that a gag order is no longer in effect if the service provider, when they first got the request from the FBI, said, “I’d like to spend some money paying my lawyer to challenge this gag order in court.” Now, this amendment was billed as an attempt to save the FBI from some unnecessary paperwork. And I can imagine when you’re issuing NSLs at the rate that the FBI is doingl, it would be a pain in the ass to chase down every gag order once it expires.

But the real effect of this is to make it highly unlikely that these gag orders will be lifted, in practice. Frankly, it was already unlikely that a bunch of banks and ISPs would willingly offer up to their customers that they had cooperated with the FBI in spying on them. Now, it’s saying that only those banks and ISPs that are willing to fight this legally will ever even know when those gag orders expire, meaning just a teeny fraction of businesses getting NSLs will be telling their customers they helped the FBI to spy on them.

Which has the net effect–I’m sure the Obama Administration hopes–of fixing the Constitutional problems with gag orders while, effectively, keeping those gag orders in place. And, at the same time, preventing a bunch of innocent Americans from learning that in the age of Obama, the government can spy on a wide range of innocent people.

Update: From my liveblog I now see what the duplicate amendments (or one of them) is supposed to do. It’s supposed to make sure that Article III Judges have absolutely no discretion at all to overrule the FBI’s self-certification that something merits a gag order.

I’m sure that won’t be abused.

Here’s all five of the Amendments Sessions introduced with what they do.

091008 Sessions Library HEN09A06: Limits the exception for libraries on Section 215 orders

091008 Sessions NSL Notice HEN09A04, 091008 Sessions NSL Notice HEN09A13: Limit the circumstances in which the FBI has to tell businesses it has issued a National Security Letter to that a gag order is no longer necessary.

091008 Sessions Pen Register HEN09A10, 091008 Sessions known to concern HEN09999: Gut minimization with pen registers.

OBAMA’S BIPARTISANSHIP: HIDING BEHIND JEFF SESSIONS’ SKIRTS WHEN ELIMINATING PRIVACY PROTECTIONS

Obama, hiding behind Jefferson Beauregard Sessions III’s skirts, has just attempted to gut privacy protections associated with pen registers, which are probably a key part of the government’s massive data mining program on Americans.

FRANKEN'S FLEETING FOURTH AMENDMENT

Remember this stunt? It was just two weeks ago that Al Franken was reading the Fourth Amendment to David Kris.