YES, THE GOVERNMENT DOES SPY UNDER GRANDFATHERED APPROVALS

Charlie Savage is catching no end of shit today because he reported on a provision in the PATRIOT Act (one I just noticed Tuesday, actually, when finding the sunset language for something else) that specifies ongoing investigations may continue even after a sunset.

> The law says that Section 215, along with another section of the Patriot Act, expires on "June 1, 2015, except that former provisions continue in effect with respect to any particular foreign intelligence investigation that began before June 1, 2015, or with respect to any particular offense or potential offense that began or occurred before June 1, 2015."
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> Michael Davidson, who until his retirement in 2011 was the Senate Intelligence Committee's top staff lawyer, said this meant that as long as there was an older counterterrorism investigation still open, the court could keep issuing Section 215 orders to phone companies indefinitely for that investigation.
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> "It was always understood that no investigation should be different the day after the sunset than it was the day before," Mr. Davidson said, adding: "There are important reasons for Congress to legislate on what, if any, program is now warranted. But considering the actual language of the sunset provision, no one should believe the present program will disappear solely because of the sunset."

> Mr. Davidson said the widespread assumption by lawmakers and executive branch officials, as well as in news articles in The New York Times and elsewhere, that the program must lapse next summer without new legislation was incorrect.
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> The exception is obscure because it was recorded as a note accompanying Section 215; while still law, it does not receive its own listing in the United States Code. It was created by the original Patriot Act and was explicitly restated in a 2006 reauthorization bill, and then quietly carried forward in 2010 and in 2011.

Now, I'm happy to give Savage shit when I think he deserves it. But I'm confident those attacking him now are wrong.

Before I get into why, let me first say that to some degree it is moot. The Administration believes that, legally, it needs no Congressional authorization to carry out the phone dragnet. None. What limits its ability to engage in the phone dragnet is not the law (at least not until some courts start striking the Administration's interpretation down). It's the willingness of the telecoms to cooperate. Right now, the government appears to have a significant problem forcing Verizon to fully cooperate. Without Verizon, you don't have an effective dragnet, which is significantly what USA Freedom and other "reform" efforts are about, to coerce or entice Verizon's full cooperation without at the same time creating a legal basis to kill the entire program.

That said, not only is Davidson likely absolutely correct, but there's precedent *at the FISA Court* for broadly approving grandfathering claims that make dubious sense.

As Davidson noted elsewhere in Savage's story, the FBI has ongoing enterprise investigations

that don't lapse — and almost certainly have not lapsed since 9/11. Indeed, that's the investigation(s) the government appears, from declassified documents, to have argued the dragnet is "relevant" to. So while some claim this perverts the definition of "particular," that's not the word that's really at issue here, it's the "relevant to" interpretation that USAF leaves intact, effectively ratifying (this time with uncontested full knowledge of Congress) the 2004 redefinition of it that everyone agrees was batshit insane. If you want to prevent this from happening, you need to affirmatively correct that FISA opinion, not to mention not ratify the definition again, which USAF would do (as would a straight reauthorization of PATRIOT next year).

And as I said, there is precedent for this kind of grandfathering at FISA, all now in the public record thanks to the declassification of the Yahoo challenge documents (and all probably known to Davidson, given that he was a lead negotiator on FISA Amendments Act which included significant discussion about sunset procedures, which they lifted from PAA.

For starters, on January 15, 2008, in an opinion approving the certifications for Protect America Act submitted in August and September 2007, Colleen Kollar-Kotelly approved the grand-fathering of the earlier 2007 large content dockets based on the government's argument that they had generally considered the same factors they promised to follow under the PAA certifications and would subject the data obtained to the post-collection procedures in the certifications. (See page 15ff)

Effectively then, this permitted them to continue collection under the older, weaker protections, under near year-long PAA certifications.

In the weeks immediately following Kollar-Kotelly's approval of the underlying certifications (though there's evidence they had

planned the move as far back as October, before they served Directives on Yahoo), the government significantly reorganized their FAA program, bringing FBI into a central role in the process and almost certainly setting up the back door searches that have become so controversial. They submitted new certifications on January 31, 2008, on what was supposed to be the original expiration date of the PAA. As Kollar-Kotelly described in an June 18, 2008 opinion (starting at 30), that came to her in the form of new procedures received on February 12, 2008, 4 days before the final expiration date of PAA.

> On February 12, 2008, the government filed in each of the 07 Dockets additional sets of procedures used by the Federal Bureau of Investigation(FBI) when that agency acquires foreign intelligence information under PAA authorities. These procedures were adopted pursuant to amendments made by the Attorney General and the Director of National Intelligence (DNI) on January 31, 2008 to the certifications in the *07 Dockets*.

Then, several weeks later — and therefore several weeks after PAA expired on February 16, 2008 — the government submitted still new procedures.

> On March 3, 2008, the government submitted NSA and FBI procedures in a new matter [redacted]
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> [snip]
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> Because the FBI and NSA procedures submitted in Docket No. [redacted] are quite similar to the procedures submitted in the *07 Dockets*, the Court has consolidated these matters for purposes of its review under 50 U.S.C. § 1805c.
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> For the reasons explained below, the Court concludes that it retains

> jurisdiction to review the above-described procedures under §1805c. On the merits, the Court finds that the FBI procedures submitted in each of the *07 Dockets*, and the NSA and FBI procedures submitted in Docket No. [redacted] satisfy the applicable review for clear error under 50 U.S.C. § 1805c(b).

She regarded these new procedures, submitted well after the law had expired, a modification of existing certifications.

> In all [redacted] of the above-captioned dockets, the DNI and the Attorney General authorized acquisitions of foreign intelligence information by making or amending certifications prior to February 16, 2009, pursuant to provisions of the PAA codified at 50 U.S.C. § 1805b.

She did this in part by relying on Reggie Walton's interim April 25, 2008 opinion in the Yahoo case that the revisions affecting Yahoo were still kosher, without, apparently, considering the very different status of procedures changed after the law had expired.

The government even considered itself to be spying with Yahoo under a September 2007 certification (that is, the latter of at least two certifications affecting Yahoo) past the July 10, 2008 passage of FISA Amendments Act, which imposed additional protections for US persons.

These are, admittedly, a slightly different case. In two cases, they amount to retaining older, less protective laws even after their replacement gets passed by Congress. In the third, it amounts to modifying procedures under a law that has already expired but remains active because of the later expiration date of the underlying certificate.

Still, this is all stuff the FISC has already

approved.

The FISC also maintains — incorrectly in my opinion, but I'm not a FISC judge so they don't much give a damn — that the 2010 and 2011 PATRIOT reauthorizations ratified everything the court had already approved, even the dragnets not explicitly laid out in the law. This sunset language was public, and there's nothing exotic about what they say. To argue the FISC wouldn't consider these valid clauses grand-fathering the dragnet, you'd have to argue they don't believe the 2010 and 2011 reauthorizations ratified even the secret things already in place. That's highly unlikely to happen, as it would bring the validity of their 40ish reauthorizations under question, which they're not going to do.

Again, I think it's moot. The "reform" process before us is about getting Verizon to engage in a dragnet that is not actually authorized by the law as written. They're not doing what the government would like them to do now, so there's no reason to believe this grandfathered language would lead them to suddenly do so.