

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

There are two disturbing details in Charlie Savage's coverage of Thursday's PATRIOT Act Hearing. As I reported on Thursday, the first thing the Committee did on Thursday was accept a whole package of amendments from Jefferson Beauregard Sessions III, doing things like limiting the library records under Section 215 which must be shown to have some tie to terrorism or spying.

Sessions: What we don't all agree on is that the PATRIOT Act is not an overreach. Classified briefing. See if we can agree on language. Operation difficulties have been altered. Five amendments to address operational issues. One, on pen registers minimization. Remember, pen registers just pick up numbers, not content. [Uh, and names, and with email, probably subject lines.] Judicial review standards for NSL non-disclosure orders. "Judges should not have discretion" to refuse a non-disclosure order if govt meets the burden.

How nice that the ranking member of SJC wants to gut Article III of the Constitution.

LOL!! Sesssions trying to eliminate library exception with "the Fourth Amendment."

Sessions, on pen registers, claims no content. (Um, except for the subject

lines of emails?)

The committee accepted those changes, with almost no discussion, on a voice vote.

Well, as Savage points out, that package came from the Administration.

A Democratic staffer, speaking on condition of anonymity, said Mr. Sessions' amendments were a verbatim transfer of the text of amendments the Obama administration had privately sent to Congress on Wednesday.

And guess what? As Savage also points out, Sessions didn't even vote for the bill!

Now, as a threshold matter, consider what the Obama Administration did. It worked with the most heinous member of the opposition party to basically get the committee to rubber stamp changes made by the Administration. Pat Leahy didn't have to answer for these changes. DiFi didn't have to answer for these changes. Nope, DiFi and Leahy are hiding behind Jefferson Beauregard Sessions III's plantation skirts.

But for that, the Obama Administration didn't even get Sessions' vote.

Changey bipartisanship we can believe in!!

Now, as Savage points out, aside from the library one, most of the amendments relate to record-keeping.

But not one that will serve to eliminate minimization for US person data in the case of some emails. As a reminder, pen registers and trap and trace devices allow investigators to get lists of who called to and from a particular number. Legislators always pretend they pertain exclusively to phone calls, but in reality they're used with emails and other online communication as well. And with emails, there's much more debate about what constitutes "content" and what constitutes "metadata" accessible through pen registers.

Here's what the DiFi substitute said before Thursday.

SEC. 4. ORDERS FOR PEN REGISTERS AND TRAP AND TRACE DEVICES FOR FOREIGN INTELLIGENCE PURPOSES.

(a) IN GENERAL.—

(1) APPLICATION.—Section 402(c) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1842(c)) is amended—

(A) in paragraph (1), by striking “and” at the end; and (B) in paragraph (2)—(i) by striking “a certification by the applicant” and inserting “a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant”; and 1 (ii) by striking the period at the end and inserting “; and”; and (C) by adding at the end the following:“(3) a statement of proposed minimization procedures.”.

(2) MINIMIZATION.—

(A) DEFINITION.—Section 401 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1841) is amended by adding at the end the following:

“(4) The term ‘minimization procedures’ means—

“(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the installation and use of a pen register or trap and trace device, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

“(B) procedures that require that

nonpublicly available information, which is not foreign intelligence information shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; and

“(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.”.

(B) PEN REGISTERS AND TRAP AND TRACE DEVICES.—Section 402 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1842) is amended— (i) in subsection (d)— (I) in paragraph (1), by inserting ‘‘, and that the proposed minimization procedures meet the definition of minimization procedures under this title’’ before the period at the end; and (II) in paragraph (2)(B)—(aa) in clause (ii)(II), by striking ‘‘and’’ after the semicolon; and (bb) by adding at the end the following:

“(iv) the minimization procedures be followed; and’’; and (ii) by adding at the end the following:

“(h) At or before the end of the period of time for which the installation and use of a pen register or trap and trace device is approved under an order or an extension under this section, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was retained or disseminated.”.

(C) EMERGENCIES.—Section 403 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1843) is amended—

(i) by redesignating subsection (c) as (d); and (ii) by inserting after subsection (b) the following:

“(c) If the Attorney General authorizes the emergency installation and use of a pen register or trap and trace device under this section, the Attorney General shall require that the minimization procedures required by this title for the issuance of a judicial order be followed.”.

(D) USE OF INFORMATION.—Section 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1845(a)) is amended by striking “provisions of” and inserting “minimization procedures required under”. [my bold]

That section basically laid out the same completely bogus for pen registers as DiFi’s amendment did for Section 215—basically allowing a judge to examine only whether the applicant had some cockamamie theory connecting this request for foreign intelligence, while not allowing her to examine whether that cockamamie theory made sense. It also gave the AG emergency authority to get them pen registers. I’ll come back to “unconsenting” in a later post.

Here’s what it looks like after ~~Sessions~~ Obama got done with it.

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(A) in paragraph (1), by striking

“and” at the end; and (B) in paragraph (2)–(i) by striking “a certification by the applicant” and inserting “a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant”; and 1 (ii) by striking the period at the end and inserting “; and”; and (C) by adding at the end the following:“(3) a statement of whether minimization procedures are being proposed and, if so, a statement of the proposed minimization procedures.”.

(2) MINIMIZATION.—

(A) DEFINITION.—Section 401 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1841) is amended by adding at the end the following:

“(4) The term ‘minimization procedures’ means—

“(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the installation and use of a pen register or trap and trace device, to minimize the retention, and prohibit the dissemination, of nonpublicly available information known to concern unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

“(B) procedures that require that nonpublicly available information, which is not foreign intelligence information shall not be disseminated in a manner that identifies any United States person, without such person’s consent, unless such person’s identity is necessary to understand foreign intelligence information or assess its importance; and

“(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.’’.

(B) PEN REGISTERS AND TRAP AND TRACE DEVICES.—Section 402 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1842) is amended— (i) in subsection (d)— (I) in paragraph (1), by inserting ‘‘, and if, in exceptional circumstances, minimization procedures are ordered, that the proposed minimization procedures meet the definition of minimization procedures under this title’’ before the period at the end; and (II) in paragraph (2)(B)—(aa) in clause (ii)(II), by striking ‘‘and’’ after the semicolon; and (bb) by adding at the end the following:

“(iv) ‘‘if applicable, the minimization procedures be followed; and’’; and (ii) by adding at the end the following:

“(h) At or before the end of the period of time for which the installation and use of a pen register or trap and trace device is approved under an order or an extension under this section, the judge may assess compliance with any applicable minimization procedures by reviewing the circumstances under which information concerning United States persons was retained or disseminated.’’.

(C) EMERGENCIES.—Section 403 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1843) is amended—

(i) by redesignating subsection (c) as (d); and (ii) by inserting after subsection (b) the following:

“(c) If the Attorney General authorizes the emergency installation and use of a pen register or trap and trace device under this section, the Attorney General shall require that minimization procedures be followed, if appropriate.”.

(D) USE OF INFORMATION.—Section 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1845(a)) is amended by striking “provisions of” and inserting “minimization procedures required under”.

See what Jeff Sessions—I mean Barack Obama—did in complete secrecy and behind the cover of Jeff Sessions’ skirts the other night?

They absolutely gutted the minimization procedures tied to pen registers! Pen registers are almost certainly the means by which the government is conducting the data mining of American people (using the meta-data from their calls and emails to decide whether to tap them fully). And Jeff Sessions—I mean Barack Obama—simply gutted any requirement that the government get rid of all this meta-data when they’re done with it. They gutted any prohibitions against sharing this information widely. In fact, they’ve specified that judges should only require minimization procedures in extraordinary circumstances. Otherwise, there is very little limiting what they can do with your data and mine once they’ve collected it.

The whole thing is disgusting: Obama sneaking these in in a last-minute classified briefing. Doing so under cover from Jeff Sessions (what? DiFi and Pat Leahy don’t want responsibility for this??). Pat Leahy letting that happen. A voice vote, so no one will ever hold Leahy and DiFi and Whitehouse and Franken and others responsible for doing this.

Update: Added one more bit of language gutting minimization from this amendment.