

ON MITCH'S PATRIOT GAMBIT

Mitch McConnell, as you've probably heard, has just introduced a bill to reauthorize the expiring provisions of the PATRIOT Act until 2020.

The move has elicited a bunch of outraged comments – as if anyone should ever expect anything but dickishness from Mitch McConnell. But few interesting analytical comments.

For example, Mitch is doing this under Rule 14, meaning it bypasses normal committee process. But that's not as unusual, in ultimate effect, as people are making out. After all, last year the House Judiciary Committee was forced to adopt a much more conservative opening bill under threat of having its jurisdiction stripped entirely – something that Bob Goodlatte surely liked because it helped him rein in the reformers on his committee. Particularly given Chuck Grassley's dawdling, I suspect something similar is at issue, an effort to give him leverage to rein in last year's USA Freedom Act in order to undercut Mitch's ploy.

Moreover, I think it would be utterly naive to believe Mitch and Richard Burr when they claim they would prefer straight reauthorization.

That's because we know the IC can't do everything they want to do under Section 215 right now. While reports that they only get 30% of calls are misleading (not least because NSA gets plenty of international calls into the US under EO 12333), for legal or technical or some other reason, the NSA isn't currently getting all the records it needs to have full coverage. But it could get all or almost all if it worked with providers.

In addition – and this may be related – the NSA has never been able to turn its automated processes back on for US collected telephone data since they had to turn them off in 2009.

They gave up trying last year, when Obama decided to move data to the providers. I suspect that the combination of mandated assistance, record delivery in optimal form, and immunity will permit NSA to dump this data into its existing automated system.

So while Mitch and Burr may pretend they'd love straight reauthorization, it is far, far more likely they're using this gambit to demand changes to USAF that permit the IC to claim more authorities while pretending to reluctantly adopt reform.

And chief on that list is likely to be data retention, something reformers have been conspicuously silent about since Dianne Feinstein revealed USAF would have had a data retention handshake, but not a mandate. Data retention is why most SSCI members opposed USAF last year, it's why Bill Nelson (working off his dated understanding of the program from when he served on SSCI) voted against it, and Bob Litt has renewed his emphasis on data retention.

Moreover, given the debates about encryption of the last year, especially Jim Comey's concerns that Apple would have an unfair advantage over Verizon if it can shield iMessage data, I suspect that by data retention they also mean "forced retention of non-telephony messaging metadata." I'm not sure whether they would be able to pull this off, but I wouldn't be surprised if the IC plans to use "NSA reform" as an opportunity to force Apple to keep iMessage metadata.

So that's what I expect this is about: I expect Mitch deliberately caused outright panic among those fighting straight reauthorization that even he doesn't really want to demand more things from this "reform" bill.