

RAND PAUL'S TIMELY QUESTIONS

Charlie Savage has a report describing how Rand Paul's hold the reconfirmation of Robert Mueller threatens to push the process beyond the time when Mueller's ten year appointment date.

[A] necessary first step – enacting legislation that would create a one-time shortened term and make an exception to a 10-year limit on the amount of time any person may serve as director – has been delayed by Senator Rand Paul of Kentucky, a libertarian-leaning Republican who was elected last year. He is invoking a Senate rule that allows any member to block a swift vote on a bill.

There may be significantly less time to complete the steps necessary to avoid a disruption at the F.B.I. than had been generally understood.

The widespread understanding has been that Mr. Mueller's term will expire on Sept. 3, because he started work as F.B.I. director on Sept. 4, 2001.

But the administration legal team has decided that Mr. Mueller's last day is likely to be Aug. 2, because President George W. Bush signed his appointment on Aug. 3, 2001. Coincidentally, Aug. 2 is also the day the government will hit a debt ceiling if Congress does not raise it.

I'll be curious, though, whether the questions Paul has submitted to be answered before the vote might also lead to a delay, too In addition to questions about:

Circumstances implicating the Iraqis indicted in Bowling Green, KY

Investigative lapses of Zacarias
Moussaoui that happened under Mueller's
predecessor
A Resource Guide: Violence Against
Reproductive Health Care Providers
calling boycotts "intimidation" (that
might be more easily answered if the
government would get over its
squeamishness about calling Scott Roeder
a terrorist)
A Missouri fusion center report
suggesting support for Ron Paul (and Bob
Barr!) might be a political risk factor
for domestic terrorism

Paul also asks for the FBI to describe how many
time it used each of the following tools,
whether against citizens or non-citizens, and
how many convictions resulted:

John Doe roving wiretaps
Section 215 orders (including its use
for library records)
National Security Letters
Suspicious Activity Reports

He also asked, with respect to SARs, whether
they got minimized after being investigated.

Now, Paul did not ask for this data in the most
savvy fashion. For example, he did not specify
on his Section 215 request that he wanted
details on the secret program that uses cell
phone data to collect geolocation. Nor did he
ask generalized questions about minimization.
Nor did he specify he wanted this data in a form
which he could release publicly.

But these questions are, to a significant
extent, the kind of disclosures that Democrats
and Paul had been pushing to add to the PATRIOT
Act.

In the past, DOJ has not exactly been
forthcoming with some of this information. Even
assuming they'll answer Paul in classified form
(particularly his question about SARs

minimization), it's not clear how quickly they'll be able to produce some of this information.

All of which adds to the possibility that Paul's request might hold up Mueller's re-confirmation past August 2. If that happens—Tom Coburn has suggested—there are a range of surveillance authorizations that might be open to challenge because no confirmed FBI Director had approved them.

Nice to see someone wring some transparency out of this silly reconfirmation process.

RUSS FEINGOLD WAS PROVED FUCKING RIGHT

A number of you have been asking for my intro of Russ Feingold last Thursday. Here it is. Now that I've had a chance to see it I realize I had a number of misstatements (and a number of places where I glossed necessary detail—I guess I speak like I blog, for better or worse).

TOM COBURN SUGGESTS PROBLEMS WITH USE OF PATRIOT ACT SECTION 215 WILL BE BIG COURT

BATTLE

I'm watching the SJC's 51 minutes of almost entirely pathetic questioning of Robert Mueller to remain Director of FBI for two more years (the only real challenge came from Al Franken on civil liberties issues). And while by far the most telling aspect of the questioning came in Mueller's repeated assertion that aspirational internet terrorists are the biggest threat we face, Tom Coburn asked a truly fascinating question.

He asked Mueller if he believed his two year extension was constitutional. He then used that as a platform to ask (my transcription),

Could you envision colorable challenge to use of 215 authority during your 2 year extension of power?

While I have no problem with you staying on for two more years, I do have concerns we could get mired in court battles [over 215] that would make you ineffective in your job.

In other words, he suggested that the Section 215 issues that Ron Wyden and Mark Udall have raised may quickly turn into a significant, and drawn-out, constitutional litigation.

Remember, Coburn was on the Senate Intelligence Committee last term. While he's no longer on the Committee (and therefore was not in the briefing on February 2, 2011 that got Wyden and Udall in such a tizzy), he would have been briefed on the FBI's use of Section 215 to develop databases of Americans who buy hydrogen peroxide and , presumably, geolocation.

FWIW, Mueller didn't really answer the question (at least not that I noticed), though in response to Al Franken he claimed the FBI has not abused any of the PATRIOT authorities.

Well, it sounds like Coburn, at least, believes a Court (and presumably, ultimately SCOTUS) may

soon have an opportunity to determine whether or not he's right.

Update: I recall now that among the things that Wyden has asked for at times—in addition to the OLC opinions backing this use of Section 215—are FISC opinions, presumably on Section 215 applications. That suggests this may already be wending its way towards SCOTUS, only via the secret FISA courts.

Update: I may have totally misunderstood. Alternately, there may be this much sensitivity on 215 that Coburn is worried. John Gerstein includes this in an article on Coburn's concerns about the constitutionality of a Mueller extension generally.

"I have concerns that we're going to get mired in court battles over this that actually make you ineffective in carrying out your job," Coburn told Mueller earlier in the committee hearing. The Oklahoma republican noted that Mueller or one of his deputies is required to sign certain types of surveillance and search orders and that such approvals could be challenged if Mueller's appointment was in question.

But why would Coburn be primarily worried about Mueller's 215 applications—and not FISA applications more generally?

Update: Ok, I've watched the piece again. Coburn was asking about potential constitutionality of Mueller's extension raising legal issues for Section 215 orders, which have to be certified by Mueller or one of two of his subordinates. That may have been just a hypothetical. But it still strikes me as an odd hypothetical.

USING DOMESTIC SURVEILLANCE TO GET RAPISTS TO SPY FOR AMERICA

The reauthorization of the PATRIOT Act focused a lot of attention on the fact that the Administration is interpreting the phrase “relevant to an authorized [intelligence] investigation” in Section 215 of the PATRIOT Act very broadly. As Ron Wyden and Mark Udall made clear, the government claims that phrase gives it the authority to collect business records on completely innocent people who have no claimed tie to terrorism.

There’s something that’s been haunting me since the PATRIOT reauthorization about how the government has defined intelligence investigations in the past. It has to do with Ted Olson’s claim—during the In Re Sealed Case appeal in 2002—that the government ought to be able to use FISA to investigate potential crimes so as to use the threat of prosecuting those crimes to recruit spies (and, I’d suggest, informants). When Olson made that claim, even Laurence Silberman (!) was skeptical. Silberman tried to think of a crime that could have no imaginable application in an intelligence investigation, and ultimately came up with rape. But Olson argued the threat of a rape prosecution might help the Feds convince a rapist to “help us.”

OLSON: And it seems to me, if anything, it illustrates the position that we’re taking about here. That, Judge Silberman, makes it clear that to the extent a FISA-approved surveillance uncovers information that’s totally unrelated – let’s say, that a person who is under surveillance has also engaged in some illegal conduct, cheating –

JUDGE LEAVY: Income tax.

SOLICITOR GENERAL OLSON: Income tax. What we keep going back to is practically all of this information might in some ways relate to the planning of a terrorist act or facilitation of it.

JUDGE SILBERMAN: Try rape. That's unlikely to have a foreign intelligence component.

SOLICITOR GENERAL OLSON: It's unlikely, but you could go to that individual and say we've got this information and we're prosecuting and you might be able to help us. I don't want to foreclose that.

JUDGE SILBERMAN: It's a stretch.

SOLICITOR GENERAL OLSON: It is a stretch but it's not impossible either. [my emphasis]

Olson went on to claim that only personal revenge in the guise of an intelligence investigation should be foreclosed as an improper use of FISA.

JUDGE SILBERMAN: In your brief you suggested only that the face of the application indicated something was wrong. I don't quite understand what would be wrong though. The face of the application, suppose the face of the application indicated a desire to use foreign surveillance to determine strictly a domestic crime, that would be – but then you wouldn't have an agent, you wouldn't have an agency. You must have some substantive requirement here if significant purpose is given its literal meaning, you must have some logic to the interpretation of that section which falls outside of the interpretation of an agent of a foreign power.

SOLICITOR GENERAL OLSON: And I suppose if the application itself revealed that there was a purpose to take personal advantage of someone who might be the subject of an investigation, to blackmail that person, or if that person had a domestic relationship and that person was seeing another person's spouse or something like that, if that would be the test on the face of things. In other words, I'm suggesting that the standard is relatively high for the very reason that it's difficult for the judiciary to evaluate and secondguess what a high level executive branch person attempting to fight terrorism is attempting to do.

This is not just Ted Olson speaking extemporaneously. The government's appeal actually makes its plan to use FISA-collected information to recruit spies (and informants), in the name of an intelligence investigation, explicit:

Although "foreign intelligence information" must be relevant or necessary to "protect" against the specified threats, the statutory definition does not limit how the government may use the information to achieve that protection. In other words, the definition does not discriminate between protection through diplomatic, economic, military, or law enforcement efforts, other than to require that those efforts be "lawful." 50 U.S.C. 1806(a), 1825(a). Thus, for example, where information is relevant or necessary to recruit a foreign spy or terrorist as a double agent, that information is "foreign intelligence information" if the recruitment effort will "protect against" espionage or terrorism.

[snip]

Whether the government intends to prosecute a foreign spy **or recruit him as a double agent (or use the threat of the former to accomplish the latter)**, the investigation will often be long range, involve the interrelation of various sources and types of information, and present unusual difficulties because of the special training and support available to foreign enemies of this country. [my emphasis]

Ultimately, the FISA Court of Review rejected this broad claim (though without discounting the possibility of using FISA to get dirt to use to recruit spies and informants explicitly).

The government claims that even prosecutions of *non*-foreign intelligence crimes are consistent with a purpose of gaining foreign intelligence information so long as the government's objective is to stop espionage or terrorism by putting an agent of a foreign power in prison. That interpretation transgresses the original FISA. It will be recalled that Congress intended section 1804(a)(7)(B) to prevent the government from targeting a foreign agent when its "true purpose" was to gain non-foreign intelligence information—such as evidence of ordinary crimes or scandals. See *supra* at p.14. (If the government inadvertently came upon evidence of ordinary crimes, FISA provided for the transmission of that evidence to the proper authority. 50 U.S.C. 1801(h)(3).) **It can be argued, however, that by providing that an application is to be granted if the government has only a "significant purpose" of gaining foreign intelligence information, the Patriot Act allows the government to have a primary objective of prosecuting an agent for a non-foreign intelligence**

crime. Yet we think that would be an anomalous reading of the amendment. For we see not the slightest indication that Congress meant to give that power to the Executive Branch. Accordingly, the manifestation of such a purpose, it seems to us, would continue to disqualify an application. That is not to deny that ordinary crimes might be inextricably intertwined with foreign intelligence crimes. For example, if a group of international terrorists were to engage in bank robberies in order to finance the manufacture of a bomb, evidence of the bank robbery should be treated just as evidence of the terrorist act itself. But the FISA process cannot be used as a device to investigate wholly unrelated ordinary crimes. [my emphasis]

Understand what this exchange meant in 2002: the government claimed that it could use FISA to collect information on people that they could then use to persuade those people to become spies or informants. That all happened in the context of broadened grand jury information sharing under PATRIOT Act. Indeed, the FISA application in question was submitted **at almost exactly the same time** as OLC wrote a still-secret opinion interpreting an “implied exception” to limits on grand jury information sharing for intelligence purposes.

[OLC] has concluded that, despite statutory restrictions upon the use of Title III wiretap information and restrictions on the use of grand jury information under Federal Rule of Criminal Procedure 6(e), the President has an inherent constitutional authority to receive all foreign intelligence information in the hands of the government necessary for him to fulfill his constitutional responsibilities and that statutes and rules should be

understood to include an implied exception so as not to interfere with that authority. See Memorandum for the Deputy Attorney General from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Effect of the Patriot Act on Disclosure to the President and Other Federal Officials of Grand Jury and Title III Information Relating to National Security and Foreign Affairs 1 (July 22, 2002);

It seems possible the government was hoping to take grand jury allegations, use FISA to investigate them, and in turn use what they found to recruit spies and informants. The one limit—and it is a significant one—is that the government would first have to make a plausible argument that the potential target in question was an agent of a foreign power.

Of course, at precisely that same time—and apparently unbeknownst to Ted Olson (I have emailed Olson on this point but he did not respond)—the government was using new data mining and network analysis approaches to establish claimed ties between Americans and al Qaeda. And the bureaucracy Royce Lamberth and James Baker had implemented to prevent such claimed ties to form the basis for FISA applications—an OIPR chaperone for all FISA applications—was rejected by the FISCR in this case. So while FISA required the government show a tie between a target and a foreign power, there was little to prevent the government from using its nifty new data mining to establish that claim. And remember, NSA twice explicitly chose not to use available means to protect Americans' privacy as it developed these data mining programs; it made sure it'd find stuff on Americans.

(Interesting trivia? Olson used the phrase "lawful" to describe the limits on what FISA allows the President to do at least 6 times in that hearing.)

Moreover, while the FISC ruling held (sort of—but probably not strongly enough that John Yoo couldn't find a way around it) that the government couldn't use FISA to gather dirt to turn people into spies and informants, it never actually argued the government couldn't use other surveillance tools, including the PATRIOT Act, to dig up dirt to use to recruit spies and informants, at least not in this FISC ruling. The limit on using FISA for such a purpose came from court precedents like Keith, not any apparent squeamishness about using government surveillance to dig up dirt to recruit spies.

The Senate Intelligence Committee presumably had what was supposed to be a meeting on the government's very broad interpretation of data it considers "relevant to an authorized [intelligence] investigation" today. We know that one of the concerns is that the government claims it can use Section 215 to collect information on people with no ties to terrorism. Ted Olson's claim we could use FISA to recruit informants make me wonder how they're using the information they collect on people with no ties to terrorism. After all, the ability to collect bank records on someone—or geolocation—might provide an interesting evidence with which to embarrass them into becoming an informant.

DIFI'S SECRET LAW

Steven Aftergood linked to this colloquy on the PATRIOT Act which reveals a lot about Ron Wyden and Mark Udall's efforts to force the government to admit how it's surveilling Americans. The colloquy basically puts not just the agreement, but the circumstances that went into the agreement, into the Congressional record.

After some Senatorial blathering (mostly Wyden and Udall talking about how swell DiFi is for

making this agreement), DiFi starts the colloquy by describing a meeting the night before (that is, on Wednesday night) between her, Wyden, Udall, Jeff Merkley, and Sheldon Whitehouse.

Mrs. FEINSTEIN. Mr. President, I wish to thank both Senator Wyden and Senator Udall for their comments. We did have a meeting last night. We did discuss this thoroughly. The decision was that we would enter into this colloquy, so I will begin it, if I may.

These Senators and I, along with the junior Senator from Oregon, Mr. Merkley, the Senator from Colorado, Mr. Mark Udall, and the Senator from Rhode Island, Mr. Whitehouse met last night to discuss this amendment, the legal interpretation of the Foreign Intelligence Surveillance Act provisions and how these provisions are implemented.

Note the presence of Merkley and Whitehouse, which I'll return to.

DiFi then talks about how great the collection program in question is.

I very much appreciate the strong views Senator Wyden and Senator Udall have in this area, and I believe they are raising a serious and important point as to how exactly these authorities are carried out. I believe we are also all in agreement that these are important counterterrorism authorities and have contributed to the security of our Nation.

At which point Wyden interrupts and basically says (still speaking in Senate blather, mind you), "um, no."

Mr. President, I have enormous respect for my special friend from California,

the distinguished chairwoman of the Intelligence Committee. I have literally sat next to her for more than a decade. We agree on virtually all of these issues, but this is an area where we have had a difference of opinion.

Wyden and Udall basically both then repeat their warnings about how the government is doing something with PATRIOT not explicitly supported by the law. At which point DiFi pipes up to say, alright already, I've conceded you have a point but don't talk about this here! Talk about it in my secret committee!

Mrs. FEINSTEIN. Mr. President, if I may respond, I have agreed that these are important issues and that the Intelligence Committee, which is charged with carrying out oversight over the 16 various intelligence agencies of what is called the intelligence community, should be carried out forthrightly. I also believe the place to do it is in the Intelligence Committee itself.

At which point she lays out the terms of the agreement: the Senate Intelligence Committee will have a hearing on the secret law right after the Memorial Day break, and if the Committee agrees to make a fix, they will amend the Intelligence Authorization.

I have said to these distinguished Senators that it would be my intention to call together a hearing as soon as we come back from the Memorial Day break with the intelligence community agencies, the senior policymakers, and the Department of Justice to make sure the committee is comfortable with the FISA programs and to make changes if changes are needed. We will do that.

So it would be my intention to have these hearings completed before the

committee considers the fiscal year 2012 intelligence authorization bill so that any amendments to FISA can be considered at that time.

The fact is, we do not usually have amendments to the intelligence authorization bill, but I believe the majority leader will do his best to secure a future commitment if such is needed for a vote on any amendment. I have not agreed to support any amendment because at this stage it is hypothetical, and we need to look very deeply into what these Senators have said and pointed out last night with specificity and get the response to it from the intelligence committee, have both sides hear it, and then make a decision that is based not only on civil liberties but also on the necessity to keep our country safe. I believe we can do that.

Note DiFi's mention of "specificity," which I'll return to.

After DiFi finishes, Wyden pipes in to say that if the Intelligence Committee doesn't decide to make a fix, then Harry Reid has promised that Wyden and Udall can introduce their amendment on a different bill, one DiFi doesn't have control over.

Senator Udall and I have discussed this issue with Senator Reid. Senator Reid indicated to the chairwoman and myself and Senator Udall that we would have an opportunity through these hearings—and, of course, any amendments to the bill would be discussed on the intelligence authorization legislation, which is a matter that obviously has to be classified—but if we were not satisfied, if we were not satisfied through that process, we would have the ability to offer an amendment such as our original

one on the Senate floor.

Of course, the chairwoman would still retain full rights to oppose it, but we would make sure if this issue of secret law wasn't fixed and there wasn't an improved process to make more transparent and more open the interpretation of the law—not what are called sources and methods which are so important to protect our people—we would have an opportunity, if it wasn't corrected in the intelligence community, to come to the floor.

Senator Reid has just indicated to all of us that he would focus on giving us a vote if we believed it was needed on another bill—not the intelligence authorization—before September 30.

Udall then weighs in with some Senate blather thank yous that provide a few more details on the meeting.

I also wish to acknowledge the involvement of the Senator from New Mexico, who is presiding at this moment in time, and the Senator from Oregon, Mr. Merkley, and the Senator from Rhode Island, Mr. Whitehouse, who has been very involved in bringing this case to the attention of all of us.

The Senator from New Mexico, of course, is Udall's cousin Tom. Apparently you even have to use Senate blather for family members.

Wyden comes back, restates the terms of the agreement (SSCI hearing, possible amendment, but if not, then an amendment in the full Senate). As part of that, he twice thanks—more Senate blather—Merkley, including this note.

Again, our thanks to the chairwoman and all of my colleagues on the floor, including Senator Merkley, who is not a

member of the committee and knows an incredible amount about it and certainly showed that last night in our discussions and was very helpful.

At which point Merkley makes this speech (plus some Senate blather).

It was William Pitt in England who commented that the wind and the rain can enter my house, but the King cannot.

It captured the spirit and understanding of the balance between personal privacy, personal freedoms, and issues of the Crown regarding maintenance of security. It was this foundation that came in for our fourth amendment of our Constitution that lays out clear standards for the protection of privacy and freedoms.

So as we have wrestled with the standard set out in the PATRIOT Act, a standard that says the government may have access to records that are relevant to an investigation—now, that term is, on its face, quite broad and expansive, quite a low standard, if you will. But what happens when it is interpreted out of the sight of this Chamber, out of the sight of the American people? That is the issue my colleague has raised, and it is a very important issue.

I applaud the chair of the Intelligence Committee for laying out a process whereby we all can wrestle with this issue in an appropriate venue and have a path for amendments in the committee or possibly here on the floor of the Senate because I do think it is our constitutional responsibility to make sure the fourth amendment of the Constitution is protected, the privacy and freedoms of citizens are protected.

At which point DiFi officially declared the

colloquy over.

So a couple of comments.

Make no mistake, not only did Wyden get this colloquy in the Senate record, but there appear to have been several threats hiding behind the Senate blather. DiFi has said she thinks the way to fix a secret law is to change it in a secret committee meeting. But Wyden et al have made it clear that if she doesn't agree to fix it in her secret committee meeting, he will try to do so on the Senate floor.

And consider the role of Merkley here. He was at the meeting on Wednesday night, the only person present who is not a member of the Intelligence Committee (and who therefore did not attend the February 2 briefing that got Wyden all fired up about this). In his presence, the concerns about the program were discussed with some "specificity" (per DiFi's description). As Wyden describes, Merkley was not only present at the meeting, but proved "he knows an incredible amount about" the problem. As part of the whole colloquy, Merkley suggests this problem is akin to letting the King enter your house, precisely what the Fourth Amendment was written to prevent.

This is a key part of the threat, I suspect. Unlike Wyden and Udall, who learned of this problem via classified briefings, Merkley appears to have figured it out on his own. Which means he can speak openly about it if there is a full Senate debate about it.

Now that implicit threat may all get buried under Senate blather. But it appears the message to DiFi is that if she doesn't fix this secret law in her secret committee, then there will be a public discussion about whatever crazy interpretation she is helping the Administration hide.

All of which sort of makes you wonder when DiFi first got briefed about this? Did the Administration brief the Gang of Four about it some time before it briefed the full committee

in February?

In any case, I'm particularly interested in Whitehouse's role in all of this. Partly, that's because he's increasingly the person other Senators (including, I believe, DiFi) look to for a read of what is acceptable or not. And Udall appears to suggest that Whitehouse had a key role in alerting him and Wyden to the problem. Yet he did not co-sponsor the legislation to fix the secret law.

So where is Whitehouse on the issue of this secret law?

HAPPY MEMORIAL DAY! REMEMBER YOUR GOVERNMENT WILL BE TRACKING WITH WHOM YOU CELEBRATE THIS WEEKEND

As I've said repeatedly in discussions of the secret interpretations of the PATRIOT Act provisions that Ron Wyden and Mark Udall complained about, those interpretations probably claim the government can collect mass information on geolocation.

Julian Sanchez lays out why that is almost certainly the case in this worthwhile post. The three main points (there are several less crucial ones) are:

- The government has been using a hybrid approach—using a combination of pen registers and 2703(d)

orders—to get geolocation data in criminal investigations with some support from courts; using pen registers with Section 215 orders could offer the same “hybrid” authorization

- The structure of Ron Wyden’s legislation aiming to rein in geolocation tracking starts with restrictions on FISA, which the criminal statute incorporates, but also includes explicit prohibitions on using pen registers and Section 215 to get geolocation information
- TruePosition’s LocInt service markets the ability to determine proximity, but doing so would rely on widespread collection of geolocation information

In other words, Sanchez lays out both the legal means we know the government has used to track geolocation, maps the legal means Wyden is attempting to use to curtail those legal means, and describes the technical necessity for widespread collection.

Which is a pretty compelling argument that the big rush to extend PATRIOT is about making sure this geolocation tracking doesn’t shut down over the Memorial Day weekend. So rest assured your government is tracking where you’re vacationing this weekend and with whom.

“ROBO-SIGNING” THE PATRIOT ACT

Chuck Todd tweeted last night:

WH announced that POTUS ordered the Patriot Act renewal to be signed by the “autopen”; so, yes, it was robosigned

Reason given for robosigning via autopen: Patriot Act expires midnight tonight, so as to not have gap, either robosigned or flown to him

Now, Todd was writing in the early hours of morning, French time, while watching hoops (I believe he’s a Heat fan). So this interpretation may be a product of his inattention/fatigue.

Nevertheless, it’s interesting because Todd improperly called signing the PATRIOT Act with an autopen “robosigning.” They’re not actually the same thing. Robosigning as currently used is when a poorly paid live person signs a name to a document (though maybe not the one whose name gets signed), claiming to attest to the accuracy of documents without actually doing so. By ordering that PATRIOT be signed using his autopen, Obamagave the law the full weight of law, yet without actually signing the document.

As I joked last night, they’re going to have to add a couple of lines to Schoolhouse Rock to explain to children the magic of the President’s autopen:

I’m just a bill, yes I’m only a bill,
thanks to the President losing his auto-quill.

I’m off to the White House to wait in a
line for the President’s autosign.

So Todd was somewhat inaccurate in calling this robo-signing. But in a funny way that accorded the PATRIOT signing the same illegitimacy and fraud of foreclosure fraud.

That said, Todd then parroted the Administration fib about why “robo-signing” was necessary: because the PATRIOT authorities extended yesterday expired at midnight, so the only way to get the bill signed into law was with Obama’s autopen (or a whole lot of wasted jet fuel, and even that wouldn’t have worked in time).

But that’s not right. Because it ignores the way Congress did nothing with the PATRIOT extensions in the existing extension period, the way those defending the status quo preferred letting time run out to a real debate on these authorities, the way a long-term extension was rammed through at the last moment.

The way to avoid the fraudulent appearance of auto-signing the PATRIOT act, of course, would have been to have an actual debate about it. But Harry Reid and John Boehner and Obama and the other defenders of the status quo couldn’t have that!

Update: Apparently it’s okay to “robo-sign” bills into law because Steven Bradbury said it was:

WH says “auto pen” use authorized by Office of Legal Counsel finding in 2005. Obama phoned auto pen OK to staff secretary last night.

THE PATRIOT ACT VOTE: ONE QUARTER OF THE

WAY TO A FOURTH AMENDMENT

The final vote in the Senate opposing yet another sunset of the PATRIOT act was 72-23-5, meaning we're almost a quarter of the way to regaining some semblance of a Fourth Amendment.

Heh.

Those voting against the forever PATRIOT?

Akaka (D-HI)	Franken (D-MN)	
Baucus (D-MT)	Harkin (D-IA)	Murray (D-WA)
Begich (D-AK)	Heller (R-NV)	Paul (R-KY)
Bingaman (D-NM)	Lautenberg (D-NJ)	Sanders (I-VT)
Brown (D-OH)	Leahy (D-VT)	Tester (D-MT)
Cantwell (D-WA)	Lee (R-UT)	Udall (D-CO)
Coons (D-DE)	Merkley (D-OR)	Udall (D-NM)
Durbin (D-IL)	Murkowski (R-AK)	Wyden (D-OR)

Though note we're not really a quarter of the way to a Fourth Amendment. Most of these Dems, I suspect, oppose the passage of another sunset without a debate. Some are particularly pissed about the latest interpretation of Section 215. But most still support the concept of PATRIOT powers.

Which means we're not really making all that much progress.

One aspect of today's vote I did find interesting, however, was that five Republicans voted against tabling Rand Paul's gun amendment (limiting the use of Section 215 to get gun records), but voted in favor of the overall sunset. These five are: Barrasso (WY), DeMint (SC), Enzi (WY), Moran (KS), and Shelby (AL).

In other words, these men seem to object only to the use of super government powers when it

threatens their gun rights, but not their First Amendment, nor their financial privacy, nor their associations.

While I happen to think figuring out what kind of guns suspected terrorists are buying is a reasonable use of a counter-terrorism law, if we have to have one, I am curious whether this vote will make gun nuts realize that their privacy's at stake, too (though Saxby Chambliss got up to make it clear that domestic terrorists—like the right wing terrorists who might most object to using PATRIOT to collect gun purchase records—were not at risk). This vote also has the makings of one that TeaParty politicians might use to distinguish themselves from **other** Republicans.

Because right now, opposition to PATRIOT excesses is still mostly a Democratic issue (though Rand Paul definitely took the leadership role Russ Feingold would have had in the past). Until more Republicans join Paul, Heller, and Lee in opposing PATRIOT, it'll remain on the books, particularly so long as we have a Democratic President whom Democratic Senators are happy to have wielding such power.

Update: After a half hour of debate, the extension passed the House 250-153.

CLAPPER: WE NEED TO PASS PATRIOT TO MAKE SURE APPLE CONTINUES TO TRACK YOUR LOCATION

I'm very sympathetic to what Glenn and bmaz and Spencer and Julian have to say about the stupid fear-mongering around today's PATRIOT extension.

Julian's explanation of how the grandfather clause would work is particularly important:

. A lapse of these provisions for a few days—or a few weeks—would have no significant effect. First, they're all covered by a grandfather clause. And contrary to what the *New York Times* implies, that *doesn't* just mean that orders or warrants already issued under these authorities remain in effect. Rather, as the Congressional Research Service explains (using the sunset deadline from prior to a short-term extension):

The grandfather clauses authorize the continued effect of the amendments with respect to investigations that began, or potential offenses that took place, before the provision's sunset date.¹⁰⁸ Thus, for example, if an individual were engaged in international terrorism on the sunset date of February 28, 2011, he would still be considered a "lone wolf" for FISA court orders sought after the provision has expired. Similarly, if an individual is engaged in international terrorism on that date, he may be the target of a roving wiretap under FISA even after authority for new roving wiretaps has expired.

Got that? Every investigation already in progress at the time of sunset gets to keep using the old powers. Every *new* investigation where the illegal conduct in question began before the sunset date gets to keep using the old powers. Over the span of a few days or weeks, that's going to cover almost every actual

investigation. For the tiny number that don't fall into those categories, if there are any at all in the space of a short lapse, investigators will be "limited" to relying on *every other incredibly broad tool* in the Foreign Intelligence Surveillance Act arsenal—with, of course, the option to use plain old criminal investigative authorities as well.

And James Clapper's fearmongering letter—which was liberated by Sam Stein—is particularly absurd on most counts.

I mean, are we supposed to worry that the government can't "conduct timely surveillance on a non-U.S. person 'lone wolf' terrorist such as an individual who has self radicalized and responds to international terrorist calls to attack the United States," when the government has never had a need to use this authority, not even with Khalid Ali-M Aldawsari, who was a "a non-U.S. person 'lone wolf' terrorist such as an individual who has self radicalized and responds to international terrorist calls to attack the United States"?

I mean, if Clapper wants to make bullshit claims, he just encourages us to treat everything he says as bullshit.

That said, I wonder whether the underlying issue here isn't the explicit powers—the ability to find out about "terrorist [and non-terrorist] purchases of bomb-making chemicals" with Section 215, for example, but instead the secret collection programs. Clapper says,

Important classified collection programs might be forced to shut down, causing us to lose valuable intelligence information that could be used to identify terrorists and disrupt their plots.

After all, we presume the government is

collecting geolocation data not through an actual investigation related to an individual suspect and therefore grandfathered in under the terms Julian laid out. We presume the government is playing fast and loose with the word “related to” in Section 215.

And so it's not so much that we'll lose track of Muslims who buy hydrogen peroxide. It's that the corporations being forced (we presume) to turn over geolocation data are going to respond to the very public lapse of PATRIOT and refuse to keep turning that data over.

(In this way, this fearmongering is precisely like the fearmongering used in February 2008 after the Protect America Act expired; the real issue was the complaints of the telecoms who were legally on the line.)

Of course, none of this means anyone ought to cave to the fearmongering. After all, if the legal basis for this collection is so sketchy that it wouldn't qualify for the grandfathering that the real authorities do, the government probably ought not be relying on it, right?

Or maybe Reid is just channeling Dick Cheney because he's anxious to start his long holiday weekend.

THE UN-PATRIOT ACTS OF HARRY REID

When the government, through its executive and compliant Congress, wants to cut surveillance and privacy corners out of laziness and control greed, and otherwise crush the soul of the Constitution and the 4th Amendment, demagoguery and fake exigencies are the order of the day. And so they are again. Oh, and of course they

want to get out of town on their vacation. And
that is what has happened today.