

HOW TO BREAK THE LAW UNDER USA F- REDUX: THE EMERGENCY PROVISION THAT WOULD BLOW UP THE BILL

Broadcast live streaming video on Ustream

As remarkable as was the House Judiciary Committee's impotence to protect the Fourth Amendment in yesterday's markup of USA F-ReDux, of equal importance was Raul Labrador's effort to more narrowly tailor the emergency provision in the bill, which permits the Attorney General to authorize emergency production under Section 215 prior to getting FISA Court approval.

EMERGENCY AUTHORITY FOR PRODUCTION OF TANGIBLE THINGS.—

(1) Notwithstanding any other provision of this section, the Attorney General may require the emergency production of tangible things if the Attorney General—

(A) reasonably determines that an emergency situation requires the production of tangible things before an order authorizing such production can with due diligence be obtained;

(B) reasonably determines that the factual basis for the issuance of an order under this section to approve such production of tangible things exists;

Labrador (at 2:07) suggested that his amendment was very minor, just requiring the emergency provision be used only when there was an actual emergency.

I don't see what it should blow up the

bill, I don't see why it would blow up the bill, all it's doing is attempting to clarify the meaning of a term in the bill, which is an emergency situation, as one that involves the potential or imminent death or bodily harm to any person.

Yet, as Labrador noted, without the restriction would permit the AG to get records whenever she wanted.

As Zoe Lofgren noted, the lack of specificity in the bill is an invitation for abuse.

Labrador's proposed change was even more minor given that we know NSA, at least, has redefined "threat of bodily harm" to "threat to property" in the case of corporate persons.

Jim Sensenbrenner, who argued that this emergency provision goes beyond what is required for emergency electronic surveillance or emergency physical surveillance under FISA, countered that tweaking the emergency provision *would* blow up the bill.

He and I may have a difference of opinion on what blows up this bill. You know, let me say this all was considered during the negotiations that were going on, I think there is an appropriate compromise to keep the dogs at bay, that is continued in the emergency appropriations of this bill and I am afraid that the amendment from the gentleman from Idaho would be who let the dogs out.

This is alarming.

I get that there's a need for an emergency provision under Section 215 if it will cover things like Internet production, because the authorization process is too long for active investigations (which wouldn't, mind you, meet the terms of Labrador's amendment). But the

emergency provision of USA F-ReDux will be one of the chief ways the IC will break the law under this bill (even going beyond what I believe to be a general violation of *Riley's* prohibition on searching smart phones without a warrant under the CDR provision).

That's because of the way the bill significantly degrades the status quo on what happens if the FISC judges that this was an inappropriate use of Section 215. Currently, the FISC can make the government destroy the records. Under the bill, the government would be prevented from actually using the records in any official proceeding, but given that the AG polices that, and given that FBI basically has a department whose role is to parallel construct records like this, what this bill becomes is a means by which the FBI can get records they know to be illegal. Then, after the FISC rules the collection illegal (or, after FBI decides to "stop" collection before the 7 day deadline and thereby avoids telling the FISC what they've done), they can still keep those records so long as they parallel construct them. I'm not even sure collection ended before application would ever get reported to Congress.

And remember, there's reason to believe that in the one year that the government has had an emergency provision for Section 215, it violated the prohibition on targeting someone for First Amendment protected activities.

If, as Sensenbrenner claims, closing some of the gaping loopholes on this provision would blow up the bill, it is an all but explicit admission that the Intelligence Community plans to use the immunity of this bill to be able to conduct illegal collection against people who are only "related" to an ongoing investigation.