

ON CARROTS, STICKS, AND RAND PAUL

Now that USA F-ReDux has become USA FreeDone, I wanted to look at Steve Vladeck's two bizarre posts attacking Rand Paul's opposition to USA F-ReDux as a way of doing a post-mortem on the process.

I say bizarre because Vladeck complains that Paul "seize[d] the national spotlight in order to focus everyone's attention on a hyper-specific question" – that of the Section 215 dragnet – when Vladeck has, at this late date, joined those of us who have long been pushing a focus on broader issues, specifically E.O. 12333 and Section 702. To support his claim that Paul is singularly focused on Section 215, Vladeck links to a second-hand report of a sentence in Paul's campaign announcement, rather than to the announcement itself which (while more muddled than in other statements where Paul has named E.O. 12333 directly) invokes surveillance authorized by Executive Order, not the PATRIOT Act.

The president created this vast dragnet by executive order. And as president on day one, I will immediately end this unconstitutional surveillance.

Contrary to Vladeck's miscitation, in this and other comments, Paul seized the national spotlight, in significant part, to talk about the broader issues, specifically E.O. 12333 and Section 702, that those pushing USA F-ReDux had set aside for future fights. Indeed, big parts of Paul's filibuster speech – including his 10 and Ron Wyden's 2 references to E.O. 12333 and his 18 and Wyden's 3 references to 702 – sounds a lot like Vladeck's series of posts worrying that this will be the only shot at reform and therefore regretting that we didn't talk about the bigger issues as part of it.

Another deficiency of the USA FREEDOM Act is that it does not address bulk

collection under Executive Order 12333. The bill also fails to address bulk collection under section 702 of the FISA Amendments Act.

One could say: What are you complaining about? You are getting some improvement. You still have problems, but you are getting some improvement.

I guess my point is that we are having this debate, and we don't have it very often. We are having the debate every 3 years, and some people have tried to make this permanent, where we would never have any debate. Even though we are only having it every 3 years, it is still uncertain whether I will be granted any amendments to this bill.

So, yes, I would like to address everything while we can. I think we ought to address section 702. I think we ought to—for goodness' sake, why won't we have some hearings on Executive Order 12333? I think they may be having them in secret, but I go back to what Senator Wyden said earlier. I think the principles of the law could be discussed in public. We don't have to reveal how we do stuff. Do we think anybody in the world thinks we are not looking at their stuff? Why don't we explore the legality and the law of how we are doing it as opposed to leaving it unsaid and unknown in secret?

In other words, unlike the drone filibuster Vladeck points to as proof of "libertarian hijacking" – where Paul definitely defined his terms narrowly (but in a later iteration did succeed in getting more response from Jim Comey than Ron Wyden making demands) – Paul was arguing for precisely what Vladeck said we should be arguing about. He just has cooties, I guess is the substance of Vladeck's argument, so Vladeck doesn't want him as an ally.

Equally bizarre is Vladeck's claim that, "it was the very same Senator Paul who all-but-singlehandedly torpedoed the Leahy bill back in November, helping to force the entirely unnecessary political and legal brinkmanship of the past week." That's bizarre because, as a matter of fact, Paul did not "singlehandedly" torpedo the bill; Bill Nelson played an equal role (and that's even assuming the bill had enough votes to pass, which given that I know of 1 pro-cloture vote who was a no vote on passage and a significant number who weren't committed to vote for it without improving amendment, was never a foregone conclusion). It's easy to blame Paul because it absolves whoever it was that whipped a bill but didn't even count all the Democratic votes on it, but Paul was in no way singlehandedly responsible.

But the view all the more bizarre, coming from Vladeck, because if Paul singlehandedly torpedoed the bill (he didn't) he also singlehandedly made the 2nd Circuit ruling for ACLU possible (he didn't, but that is Vladeck's logic). And unlike most USA F-ReDux champions, Vladeck has been very attentive— if, at times, arguably mistaken in his understanding of it — to the interaction of USA F-ReDux legislation and the courts. While USA F-ReDux is — important additional Congressional reporting requirements on PRTT and bulky 215 collection notwithstanding — definitely a worse bill than its predecessor, that's not the measure. So long as the 2nd Circuit decision ruling against "relevant to" and finding a Fourth Amendment interest at the moment of collection rather than review stands (the government still has a few weeks to challenge it), the measure is USA F-ReDux *plus* the 2nd Circuit decision as compared to USAF without the additional leverage of an appellate court ruling. There are very important things the 2nd Circuit decision may add to USA F-ReDux. Every commenter is entitled to weigh that measure themselves, but if you're going to hold Paul responsible for torpedoing the legislation last fall you also have to credit him with buying time so the 2nd Circuit could

weigh in.

Which brings me to leverage.

I was not a fan of any version of USAF because all left every key provision save the CDR function (and even some of that was left dangerously open to interpretation until HJC wrote its final bill report) subject to the whim of the Executive and/or the FISC, and the bill itself jettisoned necessary leverage over the Executive (Vladeck has written about the gutting of the FISC advocate, and a parallel gutting has happened on transparency provisions from the start). That is, rather than exercise some kind of authority over the Executive, Congress basically wrote down what the Executive wanted and passed it in a way that the Executive still had a lot of leeway to decide what it wanted to do.

I get why that happened and I don't mean to diminish the work of those who pushed for more: the votes and leadership buy-in simply isn't there yet to actually start limiting what Article II will do in secret.

But that means none of the other things Vladeck wants will be possible until we get more leverage. And while the outcome of the bill may be the same and/or worse, what is different about the passage of USA F-ReDux is that leadership in both house of Congress barely kept it together.

And Rand Paul, whether he has cooties or not, was key to that process.

That's true, in large part, because Mitch McConnell was aiming to set up an urgent crisis as a way to scare people into making the bill worse. He succeeded in doing so by delaying consideration of the bill until the last minute, but when Paul – and Ron Wyden and Martin Heinrich – prevented him from getting a short-term extension to do so without lapsing the dragnet, that changed the calculus of the crisis. It meant those who had bought into the idea you need a dragnet to keep the country safe

could be pressured to vote against McConnell's efforts to weaken USA F-ReDux. (Note, there are some who have claimed that Paul objected to immediately considering USA F-ReDux Sunday night, giving McConnell his opportunity to amend the bill, but the congressional record doesn't support that; McConnell didn't call for immediate consideration of the bill itself until he had already filled the tree with amendments.)

And while I don't want to minimize the utterly crucial efforts of Mike Lee to actually whip the vote, that effort was made easier by the very real threat that if the bill had to go back to the House it would die, resulting in a more permanent lapse to Section 215 and the other expired authorities. Leahy and others used that threat repeatedly, in fact, to argue that surveillance hawks needed to support an amended bill. And the threat was heightened because John Boehner had real worries that if he tried something funny, his own leadership would be at risk.

Last year, the privacy community was mostly fighting with carrots against an Executive branch that was dictating what it was willing to give up. Now, it's fighting with carrots and sticks. We haven't gotten the Executive branch to give up anything it didn't already want to give up yet. But having dealt McConnell a big defeat and having the threat to do so with Boehner might make that possible going forward.

Having someone like Rand Paul, who is not afraid to be accused of having cooties, to make that possible is a critical part of that process. That doesn't negate the efforts of anyone else (again, I'm really encouraged by Mike Lee's role in all this). But it does mean people holding carrots but demanding things that will only be obtained with some sticks, too, ought not to dismiss the efforts to make the threat of a stick real.