DIFI'S INVITATION TO A FISHING EXPEDITION

As I noted last night, DiFi appears to have used the Najibullah Zazi investigation as justification to make the language surrounding Section 215 of the PATRIOT Act worse, effectively granting the FBI the ability to collect secret lists of everyone who buys acetone or hydrogen peroxide.

As a reminder, Section 215 gives investigators a way to get business records or other tangible things without telling the people who those business records pertain to that they have done so. I have speculated that the FBI is using Section 215 now to search out people—who may or may not have known ties to alleged Islamic terrorists—who have purchased the precursors of TATP, the explosive that Najibullah Zazi is alleged to have tried to make. Those precursors include things like hydrogen peroxide and acetone, both common ingredients of beauty and home improvement supplies.

Here is the current Section 215 language on targeting (I've used bold and strike-through here to show significant changes).

> (2) shall include— (A) a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—

> (i) a foreign power or an agent of a foreign power;
>
> (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or
>
> (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation;

Here's the language that Pat Leahy had originally proposed.

> (A) a statement of facts showing that there are reasonable grounds to believe that the records or other things sought—
>
> '(i) are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities; and
>
> '(ii)(I) pertain to a foreign power or an agent of a foreign power;
>
> '(II) are relevant to the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or
>
> '(III) pertain to an individual in contact with, or known to, a suspected agent of a foreign power;

Leahy's language made the burden of proof here tougher, particularly in the case of someone simply "in contact with, or known to" a suspected agent of a foreign power. He took out the "presumptively relevant" language, effectively requiring the FISA Court Judge to determine this information was actually relevant to the investigation.

But here's what I understand DiFi has changed the language to (I've included the actual language below so you can check my work).

> (2) shall include— (A) a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities; ~~such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to—~~
>
> ~~(i) a foreign power or an agent of a foreign power;~~
>
> ~~(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or~~
>
> ~~(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation; and~~

DiFi's language does two things. First, it shifts the burden of proof even further than the current "presumptively relevant" to the "justify the belief of the applicant language." If I understand the language correctly, the FISA Judge would go from presuming something is relevant if the FBI has told him so, to simply checking to make sure the FBI has shown why they believe this information is relevant—and to hell whether the FISA Judge thinks it is relevant or not. Though I guess in both cases the FISA Court is just a mandated rubber stamp. [Update: I've

spoken with two people who have persuaded me the new language is an improvement over the "presumptively" language. Update2: Nope, I think I was right the first time.]

More troubling, DiFi completely eliminates any requirement that the Section 215 records have to pertain to someone with a known contact with someone suspected to be an agent of a foreign power. Whereas under the current language, the FBI arguably can only collect lists of people who have some kind of connection to Zazi who have also bought acetone and/or hydrogen peroxide, under DiFi's proposed language, they could collect lists of everyone—everyone!!—who has bought products with acetone or hydrogen peroxide in it.

As Russ Feingold pointed out yesterday, during the last reauthorization of the PATRIOT Act, DiFi said that such broad language would be an invitation to a fishing expedition.

I guess, in the interim four years, she has developed a taste for fishing.

(Image by Louisiana Angler)

RECORDS AND TANGIBLE THINGS.
(a) IN GENERAL.—Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) is amended—

(1) in the section heading, by inserting ''AND OTHER TANGIBLE THINGS'' after ''CERTAIN BUSINESS RECORDS'';

(2) in subsection (b)(2)—

(A) in subparagraph (A)—

(i) by striking ''a statement of facts showing'' and inserting ''a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant''; and

(ii) by striking ''clandestine intelligence activities,'' and all that follows and inserting

‘‘clandestine intelligence activities;’’; and

(B) by striking subparagraph (B) and inserting the following:

‘‘(B) if the records sought pertain to libraries (as defined in section 213(1) of the Library Services and Technology Act (20 U.S.C. 9122(1)), including library records or patron lists, a statement of facts showing that there are reasonable grounds to believe that the records sought—‘‘(i) are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against inter-national terrorism or clandestine intelligence activities; and ‘‘(ii)(I) pertain to a foreign power or an agent of a foreign power; ‘‘(II) are relevant to the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or ‘‘(III) pertain to an individual in contact with, or known to, a suspected agent of a foreign power; and

‘‘(C) a statement of proposed minimization procedures.’’; and

(3) in subsection (c)—

(A) in paragraph (1)—(i) by inserting ‘‘and that the proposed minimization procedures meet the definition of minimization procedures under subsection (g)’’ after ‘‘subsections (a) and (b)’’; and (ii) by striking the second sentence; and (B) in paragraph (2)— (i) in subparagraph (D), by striking ‘‘and’’ at the end; (ii) in subparagraph (E), by striking the period at the end and inserting ‘‘; and’’; and (iii) by adding at the end the following: ‘‘(F) shall direct that the minimization procedures be followed.’’