

DIFI AND PAT LEAHY, SILENCING THE LIBRARIANS

✘ There's a cynical passage in the new PATRIOT language that DiFi put forward the other night. It basically creates an exception in the worsened Section 215 language just for libraries.

“(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;

This language requires that before investigators demand libraries turn over records, they must first prove that the person to whom the records pertain is either an intelligence investigation suspect, or is in contact with one. So for library records, and library records only, the new language requires some showing of reasonable cause first before the investigators can request

the information.

During the hearing, Ben Cardin asked why there was a special standard for libraries (at about 108:30 in the hearing). Kyl offered this explanation for the exception (one he disagrees with):

Kyl: There was such a—I would say—unwarranted and irrational, and I certainly don't apply that word to anyone here but from some folks out in the country—concern about library records as the result of blogs and so on, it was simply easier to say, okay, cut it loose, it's important but not that important to hold up the rest of the legislation.

[snip]

In order to get rid of the political argument that was, essentially, irrelevant in almost all investigations, it was simply easier to cut that lose and have a different standard for it.

Durbin then calls Leahy and Kyl on their cynicism, arguing that the exception just for libraries proves that the underlying principle of Section 215, as written, is unsound.

Durbin: Senator Kyl raised an interesting question. Why aren't more people complaining about this if it is such a problem? Because most innocent Americans don't have a clue what's going on here, that their own personal information, documentation, tangible things, and business records, can be, in fact, investigated, and may be investigated. They don't know. But there was one group, called the American Library Association, that said, "we're going to stand up for everybody. Not just those that know their rights are being violated, but those who might be violated, we think there's a

constitutional principle involved in it." You have characterized their efforts as unwarranted and irrational. I see it differently. Senator Kyl's entitled to his opinion. I think they were very rational and constitutional. And because they stood up for the principle and made the noise, in your words, we're gonna cut 'em loose. We're going to get rid of a political argument here when it comes to libraries. But it's totally inconsistent. If all of the hospitals in America come together with the American Hospital Association and say, "we want to protect the confidentiality of our medical records for innocent Americans who haven't been accused of any possibility of terrorism." If they make enough noise and enough quote irrational noise, are we going to except them the next time that we go through this? Is the principle sound if that's the case? I think the principle is sound enough that it was passed unanimously here four years ago and should be passed again.

As Kyl and Durbin have this exchange, Leahy twice pushes for an immediate vote, with Feinstein pushing, too. Ultimately the committee votes—on an amendment to reinstate the controls on Article 215 that Leahy had originally had in the bill—to kill the amendment.

Durbin and Kyl are right. Leahy and DiFi included this language solely to avoid a political fight with an existing lobby that knows the implications of this Section. They know that if too many other groups realize the implications of the librarians' larger argument, more people will object.

So to prevent the librarians from doing anything to mess up their attack on the Fourth Amendment, two Democratic Senators have just bought their silence with this clause of the bill.

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