OBAMA'S OTHER SESSIONS AMENDMENTS

In my last post, I described how the Obama Administration had gotten Jefferson Beauregard Sessions III to introduce an amendment to the PATRIOT Act essentially gutting minimization in the case of pen registers and trap and trace devices. This means they can bulk collect your communication information, find out who you communicate with and for how long, keep that information, and distribute that information, unless a judge "in extraordinary circumstances" tells the government they can't do so. If you haven't read that post go do so.

Since that was such a stinker, I figured I ought to figure out what else the Obama Administration had snuck in under cover of the loathsome Sessions' skirts.

There are basically two other amendments. As I explained, DiFi's substitute for the PATRIOT renewal made Section 215 worse by requiring an applicant to show only some cockamamie theory on how the records are relevant to international intelligence; the judge doesn't get to determine whether that theory makes sense or not. But DiFi (with the help of Pat Leahy) put in an exception for librarians, because librarians have a way of getting pissy when the government starts conducting fishing expeditions. One of Sessions' amendments limits that exception to circulation records and patron data, presumably making it clear that the government can do the same kind of data mining on library computers as they do on every other computer.

The other amendment—which apparently was submitted in two amendments that are virtually identical (one, two)—plays a nice trick with NSL gag orders. As a reminder, NSLs are subpoenas that require no judicial review. The Special Agent in Charge of an FBI office can approve them, based on a statement that shows an agent's cockamamie theory relating the desired records

to an international intelligence investigation. With that subpoena, the agent can get certain kinds of financial records under a gag order.

Now, you may recall that courts around the country have found that gag order to be unconstitutional. So, presumably to fix a Constitutional deficiency, DiFi added language that would have required the FBI to tell financial institutions when the gag order was no longer necessary. For each class of financial provider in question, the bill included language like this:

> (4) TERMINATION.—If the facts supporting a nondisclosure requirement cease to exist, an appropriate official of the Federal Bureau of Investigation shall promptly notify the wire or electronic service provider, or officer, employee, or agent thereof, subject to the nondisclosure requirement that the nondisclosure requirement is no longer in effect.

That is, DiFi's version of the bill basically said, "when you no longer need a gag order (either because you've indicted the person in question or you've determined the person is totally innocent, you've got to tell the service provider that the gag order is no longer in place, and if the service provider feels like it, they can tell their customer." ~~Sessions'~~ Obama's amendment effectively changes that to say:

> (4) TERMINATION.—**In the case of any request for which a recipient has submitted a notification under paragraph (3)(B)**, if the facts supporting a nondisclosure requirement cease to exist, an appropriate official of the Federal Bureau of Investigation shall promptly notify the wire or electronic service provider, or officer, employee, or agent thereof, subject to the nondisclosure requirement that the

> nondisclosure requirement is no longer in effect.

That “submit a notification” refers to the process by which providers legally challenge gag orders. That means that the FBI only has to tell a service provider that a gag order is no longer in effect if the service provider, when they first got the request from the FBI, said, “I’d like to spend some money paying my lawyer to challenge this gag order in court.” Now, this amendment was billed as an attempt to save the FBI from some unnecessary paperwork. And I can imagine when you’re issuing NSLs at the rate that the FBI is doingl, it would be a pain in the ass to chase down every gag order once it expires.

But the real effect of this is to make it **highly unlikely** that these gag orders will be lifted, in practice. Frankly, it was already unlikely that a bunch of banks and ISPs would willingly offer up to their customers that they had cooperated with the FBI in spying on them. Now, it’s saying that only those banks and ISPs that are willing to fight this legally will ever even know when those gag orders expire, meaning just a teeny fraction of businesses getting NSLs will be telling their customers they helped the FBI to spy on them.

Which has the net effect—I’m sure the Obama Administration hopes—of fixing the Constitutional problems with gag orders while, effectively, keeping those gag orders in place. And, at the same time, preventing a bunch of innocent Americans from learning that in the age of Obama, the government can spy on a wide range of innocent people.

Update: From my liveblog I now see what the duplicate amendments (or one of them) is supposed to do. It’s supposed to make sure that Article III Judges have absolutely no discretion at all to overrule the FBI’s self-certification that something merits a gag order.

I’m sure that won’t be abused.

Here’s all five of the Amendments Sessions introduced with what they do.

091008 Sessions Library HEN09A06: Limits the exception for libraries on Section 215 orders

091008 Sessions NSL Notice HEN09A04, 091008 Sessions NSL Notice HEN09A13: Limit the circumstances in which the FBI has to tell businesses it has issued a National Security Letter to that a gag order is no longer necessary.

091008 Sessions Pen Register HEN09A10, 091008 Sessions known to concern HEN09999: Gut minimization with pen registers.