

TOM COBURN SUGGESTS PROBLEMS WITH USE OF PATRIOT ACT SECTION 215 WILL BE BIG COURT BATTLE

I'm watching the SJC's 51 minutes of almost entirely pathetic questioning of Robert Mueller to remain Director of FBI for two more years (the only real challenge came from Al Franken on civil liberties issues). And while by far the most telling aspect of the questioning came in Mueller's repeated assertion that aspirational internet terrorists are the biggest threat we face, Tom Coburn asked a truly fascinating question.

He asked Mueller if he believed his two year extension was constitutional. He then used that as a platform to ask (my transcription),

Could you envision colorable challenge to use of 215 authority during your 2 year extension of power?

While I have no problem with you staying on for two more years, I do have concerns we could get mired in court battles [over 215] that would make you ineffective in your job.

In other words, he suggested that the Section 215 issues that Ron Wyden and Mark Udall have raised may quickly turn into a significant, and drawn-out, constitutional litigation.

Remember, Coburn was on the Senate Intelligence Committee last term. While he's no longer on the Committee (and therefore was not in the briefing on February 2, 2011 that got Wyden and Udall in such a tizzy), he would have been briefed on the FBI's use of Section 215 to develop databases of Americans who buy hydrogen peroxide and ,

presumably, geolocation.

FWIW, Mueller didn't really answer the question (at least not that I noticed), though in response to Al Franken he claimed the FBI has not abused any of the PATRIOT authorities.

Well, it sounds like Coburn, at least, believes a Court (and presumably, ultimately SCOTUS) may soon have an opportunity to determine whether or not he's right.

Update: I recall now that among the things that Wyden has asked for at times—in addition to the OLC opinions backing this use of Section 215—are FISC opinions, presumably on Section 215 applications. That suggests this may already be wending its way towards SCOTUS, only via the secret FISA courts.

Update: I may have totally misunderstood. Alternately, there may be this much sensitivity on 215 that Coburn is worried. John Gerstein includes this in an article on Coburn's concerns about the constitutionality of a Mueller extension generally.

"I have concerns that we're going to get mired in court battles over this that actually make you ineffective in carrying out your job," Coburn told Mueller earlier in the committee hearing. The Oklahoma republican noted that Mueller or one of his deputies is required to sign certain types of surveillance and search orders and that such approvals could be challenged if Mueller's appointment was in question.

But why would Coburn be primarily worried about Mueller's 215 applications—and not FISA applications more generally?

Update: Ok, I've watched the piece again. Coburn was asking about potential constitutionality of Mueller's extension raising legal issues for Section 215 orders, which have to be certified by Mueller or one of two of his subordinates. That

may have been just a hypothetical. But it still strikes me as an odd hypothetical.