

JOHN “BATES STAMP” LIVES UP TO THE NAME

On February 19, 2013, John Bates approved a Section 215 order targeting an alleged American citizen terrorist. He hesitated over the approval because the target’s actions consisted of protected First Amendment speech.

A more difficult question is whether the application shows reasonable grounds to believe that the investigation of [redacted] is not being conducted solely upon the basis of activities protected by the first amendment. None of the conduct of speech that the application attributes to [4 lines redacted] appears to fall outside the ambit of the first amendment. Even [redacted] – in particular, his statement that [redacted] – seems to fall well short of the sort of incitement to imminent violence or “true threat” that would take it outside the protection of the first amendment. Indeed, the government’s own assessment of [redacted] points to the conclusion that it is protected speech. [redacted] Under the circumstances, the Court is doubtful that the facts regarding [redacted] own words and conduct alone establish reasonable grounds to believe that the investigation is not being conducted solely on the basis of first amendment.

He alleviated his concerns by apparently relying on the activities of others to authorize the order.

The Court is satisfied, however, that Section 1861 also permits consideration of the related conduct of [redacted] in determining whether the first amendment requirement is satisfied. The text of Section 1861 does not restrict the Court

to considering only the activities of the subject of the investigation in determining whether the investigation is “not conducted solely on the basis of activities protected by the first amendment.” Rather, the pertinent statutory text focuses on the character (protected by the first amendment or not) of the “activities” that are the “basis” of the investigation.

Later in the opinion, Bates made it clear these are activities of someone besides the US citizen target of this order, because the activities in question were not being done by US persons.

Such activities, of course, would not be protected by the first amendment even if they were carried out by a United States person.

If I’m right that behind the redactions Bates is saying the activities of associates were enough to get beyond the First Amendment bar for someone only expressing support, then it would seem to require Association analysis. But then, Bates, the big fan of not having any help on his FISC opinions, wouldn’t consider that because the government never does.

Ah well. At least we can finally clarify about whether or not the FISC is a rubber stamp for Administration spying. No. It’s a Bates stamp – in which judges engage in flaccid legal analysis in secret before approving fairly troubling applications. Which is just as pathetic.