ADAM SCHIFF TOTALLY GUTTED THE SECTION 215 NOTICE PROVISION IN THE FISA REAUTHORIZATION BILL

I'm working on a series of posts about the bill reauthorizing Section 215 that will be pushed through Congress today. Effectively, Adam Schiff took the Jerry Nadler bill, watered down some key provisions, but added a bunch of symbolic certifications that would do nothing to eliminate the kinds of problems in the Carter Page application, probably are less effective than certifications presiding FISA judge James Boasberg required the other day, but give Republicans who are too stupid to understand FISA the ability to claim victory.

One of the ways that Schiff has watered down the Nadler bill is particular alarming. It effectively guts efforts to require notice to defendants for Section 215. Here's the language in his bill:

> (2) USE IN TRIALS, HEARINGS, OR OTHER PROCEEDINGS.—For purposes of subsections (b) through (h) of section 106—
>
> (A) information obtained or derived from the production of tangible things pursuant to an investigation conducted under this section shall be deemed to be information acquired from an electronic surveillance pursuant to title I, **unless the court or other authority of the United States finds, in response to a motion from the Government, that providing notice to an aggrieved person would harm the national security of the United States;** and
>
> (B) in carrying out subparagraph (A), a person shall be deemed to be an

> aggrieved person if
>
> (i) the person is the target of such an investigation; **and**
>
> (ii) the activities or communications of the person are described in **the tangible things that the Government intends to use or disclose in any trial, hearing, or other proceeding.**

Here's Nadler's original language:

> (2) USE IN TRIALS, HEARINGS, OR OTHER PROCEEDINGS.—For purposes of subsections (b) through (h) of section 106—
>
> (A) information obtained or derived from the production of tangible things pursuant to an investigation conducted under this section shall be deemed to be information acquired from an electronic surveillance pursuant to title I; and
>
> (B) in carrying out subparagraph (A), a person shall be deemed to be an aggrieved person if—
>
> (i) the person is the target of such an investigation; or
>
> (ii) the activities or communications of the person are described in any tangible thing collected pursuant to such an investigation.

As it was, Nadler's language had a loophole, in that it changed the definition of aggrieved person. Under 18 USC §1801, an aggrieved person is anyone who is either the target or who has been caught up in a wiretap or other collection targeting them.

> "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

Under Nadler's bill, someone is aggrieved *only if* they are the "target" of "such an investigation. But "investigation" there seems to pertain to the original 215 order, meaning that if someone started a second investigation into someone based off information discovered in 215 (which is often used for lead generation) it's not even clear they would count as the target, even if they were the ones being prosecuted or put on a no-fly list or some such thing.

Still, under Nadler's bill, that person would likely still get notice if their activities — say, buying a pressure cooker or access a certain website — would have been collected using the 215 order.

But Schiff's bill utterly guts even that. He does so in three ways.

Working from the bottom, Schiff requires that you be *both* the target of the investigation *and* that your activities or communications got collected under 215. It appears to mean that only those who are the target of the original 215 order would be aggrieved (there are still a number of bulky orders that don't target any person, so if an investigation arose out of a lead from such bulky orders, no one would ever be aggrieved under this definition).

Then, Schiff only counts someone as aggrieved if the government will introduce the evidence collected under 215 order. That is, if someone is targeted in part for buying a pressure cooker, but the pressure cooker lead led to a bunch of other evidence, that person might never count as aggrieved even if the original investigation into her came from purchasing a pressure cooker.

Plus, this language seems to invite parallel construction. If the government wanted to introduce evidence of that pressure cooker purchase, they could just subpoena the store directly.

Finally, and most outrageously, the government can still move not to give that notice based on a claim that providing it "would harm to the national security of the United States." Outrageously, they don't even have to convince a judge that such harm is real. A court "or other authority of the United States" could agree with such a finding. The Attorney General is "an authority of the United States." So Attorney General Bill Barr — the father of the first subpoena based dragnet — could make a motion saying that notice of a dragnet would harm the national security of the United States, and Attorney General Bill Barr could agree with Bill Barr that that's the case.

This is how the whole dragnet problem started in the first place, when, in 1992, Bill Barr decided that he could authorized secret dragnets.

It's hard to believe the bill would make such ridiculous changes unless there were something DOJ is trying to hide. Whatever the reason, this language utterly guts the notice provision, while still pretending it actually does include one.