

THE CARTER PAGE CLAUSES IN THE FISA REFORM BILL WOULDN'T HELP CARTER PAGE

The House Judiciary Committee has released a mark-up for a bill that would reauthorize Section 215 and make some improvements. It's not a bad bill. It would:

- End the Call Detail Record program and prohibit prospective call record collection
- Include notice for 215 collection
- End FBI's exemption for reporting requirements
- Improve the FISA amicus
- Impose deadlines for releasing FISA orders

But the bill almost certainly doesn't accomplish the things it first set out to do, to provide added protections for someone like Carter Page. It does this in two ways.

First, it requires the Privacy and Civil Liberties Oversight Board to complete a report on how much First Amendment activities or race, ethnicity, national origin, religion, or sex are used in targeting decisions under FISA.

SEC. 303. REPORT ON USE OF FISA
AUTHORITIES REGARDING PROTECTED
ACTIVITIES AND PROTECTED CLASSES.

(a) REPORT.—Not later than one year after the date of the enactment of this Act, the Privacy and Civil Liberties Oversight Board shall make publicly available, to the extent practicable, a

report on—

(1) the extent to which the activities and protected classes described in subsection (b) are used to support targeting decisions in the use of authorities pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); and

(2) the impact of the use of such authorities on such activities and protected classes.

(b) ACTIVITIES AND PROTECTED CLASSES DESCRIBED.—The activities and protected classes described in this subsection are the following:

(1) Activities and expression protected by the First Amendment to the Constitution of the United States.

(2) Race, ethnicity, national origin, religious affiliation, sex, and any other protected characteristic determined appropriate by the Board.

(c) FORM.—In addition to the report made publicly available under subsection (a), the Board may submit to the appropriate congressional committees a classified annex.

One would imagine that Carter Page, whom the Republicans think was targeted because he volunteered for the Trump campaign, would be among the people bill drafters had in mind for First Amendment protect activities.

Except he wouldn't be included, for two reasons.

First, PCLOB's mandate is limited to counterterrorism programs. That didn't matter for their very good Section 215 report, because they were examining only the CDR program, which itself was limited to terrorism (and Iran).

But it *did* matter for the Section 702 report. In

fact, PCL0B ignored some of the most problematic practices under Section 702, conducted under the guise of cybersecurity, because that's outside their mandate! It also didn't explore the impact of NSA's too-broad definition of targeting under the Foreign Government certificate.

In this case, unless you expand the scope of PCL0B, then this report would *only* report on the targets of terrorism FISA activity, not foreign intelligence FISA activity, and so not people like Carter Page.

Carter Page would also not be covered under this and a clause attempting to ensure the FISA amicus reviews applications with any First Amendment component.

(a) EXPANSION OF APPOINTMENT AUTHORITY.—
Subparagraph (A) of section 103(i)(2)
(50 U.S.C. 1803(i)(2)) is amended to
read as follows:

“(A) shall appoint an individual who
has been designated under paragraph (1)
to serve as amicus curiae to assist such
court in the consideration of any
application for an order or review that,
in the opinion of the court—

“(i) presents a novel or significant
interpretation of the law, unless the
court issues a finding that such
appointment is not appropriate; or

“(ii) presents significant concerns
with respect to the activities of a
United States person that are protected
by the first amendment to the
Constitution, unless the court issues a
finding that such appointment is not
appropriate; and”.

Here, the problem has to do with the investigation into Carter Page, and the way I understand FISA was written originally.

As I note in this post, DOJ IG didn't figure out until 11 days after it published the Carter Page

IG Report that the FBI used (and may still use) the same investigative code for both FARA – which by definition has a political component – and 18 USC 951 – which doesn't need to have. The report as a whole had a long discussion of the standard to get beyond First Amendment considerations, as if all four Trump flunkies targeted under Crossfire Hurricane would qualify.

FISA provides that a U.S. person may not be found to be a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment. 129 Congress added this language to reinforce that lawful political activities may not serve as the only basis for a probable cause finding, recognizing that “there may often be a narrow line between covert action and lawful activities undertaken by Americans in the exercise of the [F]irst [A]mendment rights,” particularly between legitimate political activity and “other clandestine intelligence activities. “130 The Report by SSCI accompanying the passage of FISA states that there must be “willful” deception about the origin or intent of political activity to support a finding that it constitutes “other clandestine intelligence activities”:

If...foreign intelligence services hide behind the cover of some person or organization in order to influence American political events and deceive Americans into believing that the opinions or influence are of domestic origin and initiative and such deception is willfully maintained in violation of the Foreign Agents Registration Act, then electronic surveillance might be justified under [“other clandestine intelligence activities”] if all the other criteria of [FISA] were met. 131

129 See 50 U.S.C. §§ 1805(a)(2)(A), 1824(a)(2)(A).

130 H. Rep. 95-1283 at 41, 79-80; FISA guidance at 7-8; see also Rosen, 447 F. Supp. 2d at 547-48 (probable cause finding may be based partly on First Amendment protected activity).

131 See S. Rep. 95-701 at 24-25. The Foreign Agents Registration Act, 22 U.S.C. § 611 et seq., is a disclosure statute that requires persons acting as agents of foreign principals such as a foreign government or foreign political party in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities.

Except it miscited the reference to the Senate Report. The citation, as written, goes to a passage of the Senate Report that says that if a potential target is acting under the direction of an intelligence service of a foreign power, they can be targeted even for their political activities.

It is the intent of this requirement that even if there is some substantial contact between domestic groups or individual citizens and a foreign power, as defined in this bill, no electronic surveillance wider this subparagraph may be authorized unless the American is acting under the direction of an intelligence service of a foreign power.

The investigation into Carter Page started because he kept sharing non-public economic information with people he knew to be Russian intelligence officers (it was probably started as some kind of economic espionage case).

That is, even before he joined the campaign, FBI

had gotten beyond the bar that would treat Page's targeting as a First Amendment concern, because the entire suspicion stemmed from Page's explicit willingness to act at the direction of Russia's intelligence service.

Don't get me wrong. These are both improvements, with the amicus review for First Amendment activities especially (indeed, I suspect that's what some of the applications that FBI withdrew in recent years pertained to).

But to do what this bill wants to do on the PCLOB report, you'd have to expand the mandate of PCLOB to cover hacking and spying – something that should happen in any case. That's especially crucial in this case, given that one of the ethnicities most affected by FISA are Chinese Americans, but as suspected spies, not as suspected terrorists.

And if you want Carter Page to get these enhanced protections, you'd need to change how working for a foreign country affects the First Amendment calculation on FISA.