Analysis of H.R. 6304: It's Still Immunity!

Title II of H.R. 6304 is in substance the same as the original telecom immunity provisions of S. 2248, with only a few inconsequential changes. Most critically, it still **prevents the court from ruling on the legality of the telecoms' assistance** in warrantless surveillance.

This may not be immediately evident on first read since the structure has changed considerably: the provisions for so-called "retroactive" immunity in the original bill's Section 202 have been combined with the so-called "prospective" immunity from the original Section 203.

But the substance of this unconstitutional bill is still the same:

Cases Will Still Be Dismissed Based On A Permission Slip From The President.

As before, cases against telecoms that provided assistance "in connection with" (p. 89:20) the President's warrantless surveillance program "shall be promptly dismissed" (p. 89:2) so long as the AG certifies to the court that they got a piece of paper "indicating" (p. 90:10) that the surveillance was "authorized by the President ... and ... determined to be lawful" (p. 90:12-13), *i.e.,* the piece of paper that we already know they got, based on the Senate Intelligence Committee's Report.

Because This Basic Structure Has Not Changed, All Purported "Concessions" Are Meaningless.

The criticisms leveled at the Bond proposal by Senators Dodd and Feingold still hold true:

[The] court's role would be limited to evaluating precisely the same question laid out in the Senate bill: whether a company received 'a written request or directive from the Attorney General or the head of an element of the intelligence community ... indicating that the activity was authorized by the President and determined to be lawful .... Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the court would be required to grant immunity. To agree to such a proposal would not represent a reasonable compromise.

The Change In Venue From The FISC To District Court Is Meaningless.

Change in venue was never a concession anyway, since the original immunity determination was also going to be made in the district court, not the FISA court. Regardless, it doesn't matter what court this determination is being made in, when the bill turns the court into a rubber stump.

The Court's Authority To See The Directives Provided To The Telecoms Is Meaningless.

The new bill specifically allows the Court to see the directives that were given to the telecoms as "supplemental materials" to the AG certification (p. 90:22), but the court is still only evaluating *whether they existed*, not whether they were legal requests, or whether it was legal for the phone companies to comply with them. Thus, even if a court independently would have ruled the directives and the surveillance they authorized to be unlawful, the bill still requires the court to rubber stamp the retroactive immunity it provides.

The Change In Review Standard Is Meaningless.

The old bill had the court review the AG certification for "abuse of discretion," while this one requires that it find the certification to be "supported by substantial evidence" (p. 90:20), i.e., the supplemental materials. Yet again, the court is only reviewing for a fact that we already know is true: that the telecoms received the "President says it's OK" paper. The standard could be "beyond a reasonable doubt" and it would not matter.

(Notably, the Republicans have actually stepped back from one of their sham concessions--the original Bond proposal would've used a "preponderance of the evidence" standard, a higher standard than "substantial evidence".)

Allowing Plaintiffs To Brief The Court Is Meaningless.

Plaintiffs could and would brief the Court on the legality of the immunity provision regardless of whether the statute specifically allowed it, while allowing plaintiffs to brief the court on the validity of the AG certification—which certifies to a fact that we already know is true!—is also of no help. So the new provision explicitly allowing plaintiffs to brief the court (p. 91:20), like the heightening of the review standard and the allowance for court review of the directives, is meaningless, **meant to provide the *appearance* of meaningful review and nothing more**.