

THE GOVERNMENT'S UNCLEAR DEMANDS FOR EMAILS

Ryan Singel and Mary have pointed to to Ken Wainstein's confirmation of something we've been discussing for some time: the problem with FISA's restrictions on foreign communication has to do with email.

But in response to a question at the meeting by David Kris, a former federal prosecutor and a FISA expert, Wainstein said FISA's current strictures did not cover strictly foreign wire and radio communications, even if acquired in the United States. **The real concern, he said, is primarily e-mail, because "essentially you don't know where the recipient is going to be" and so you would not know in advance whether the communication is entirely outside the United States.** [my emphasis]

Now that the Administration is finally telling us some truths about their program, I think it worthwhile to repeat and expand on an observation I made here about CCIA's letter opposing telecom immunity. CCIA, after all, represents three big email companies: Microsoft (Hotmail), Google (Gmail), and Yahoo. And in their letter, these email companies directly tie immunity with confusing requests from the government.

To the Members of the U.S. House of Representatives:

The Computer & Communications Industry Association (CCIA) strongly opposes S. 2248, the "FISA Amendments Act of 2007," as passed by the Senate on February 12, 2008. CCIA believes that this bill should not provide retroactive immunity to corporations that may have

participated in violations of federal law. CCIA represents an industry that is called upon for cooperation and assistance in law enforcement. **To act with speed in times of crisis, our industry needs clear rules, not vague promises** that the U.S. Government can be relied upon to paper over Constitutional transgressions after the fact. !!

CCIA dismisses with contempt the manufactured hysteria that industry will not aid the United States Government when the law is clear. As a representative of industry, I find that suggestion insulting. To imply that our industry would refuse assistance under established law is an affront to the civic integrity of businesses that have consistently cooperated unquestioningly with legal requests for information. This also conflates the separate questions of blanket retroactive immunity for violations of law, and prospective immunity, the latter of which we strongly support.

Therefore, CCIA urges you to reject S. 2248. **America will be safer if the lines are bright.** The perpetual promise of bestowing **amnesty** for any and all misdeeds committed in the name of security **will condemn us to the uncertainty and dubious legalities of the past.** Let that not be our future as well. [my emphasis]

Email providers argue that immunity will contribute to uncertainty. They speak of receiving "vague promises," they demand "clear rules" and "bright lines."

Given that complaints about uncertainty and unclear demands have led these email providers to strongly oppose retroactive immunity, it suggests the requests the email providers got were really murky—murky enough that the requests

caused the email providers a good deal of trouble.

If the government was making such murky requests, don't you think Congress ought to know what those requests were in more detail?