HJC CALLS BULL ON SSCI'S CONCLUSIONS

The Democrats on HJC have been doing their homework while the Republicans have been fear-mongering. They've read the documents related to the illegal wiretapping program, held secret hearings with the telecom companies, and called bull on several of the conclusions formed by SSCI. Not surprisingly, this letter justifies the FISA alternative which will come up for a vote later this afternoon.

The letter reveals the timing of the hearings with the telecom companies—but does not reveal whether the Republicans deigned to attend.

> In recent weeks, Judiciary Committee members have received classified briefings from intelligence and Justice Department officials on the Administration's warrantless surveillance program; we have been provided access to the same classified documents on the program that were provided months ago to the Senate Intelligence and Judiciary Committees (and, more recently, to the House Permanent Select Committee on Intelligence); and **the Committee has conducted lengthy and extensive classified hearings on February 28 and March 5 to hear testimony from telecom** and Administration officials. A key focus of that effort was the issue of retroactive immunity for phone companies that participated in the warrantless surveillance program. [my emphasis]

The hearings appear to have taken place during that period when the Republicans had taken their toys and gone home—so it's likely, by refusing to let their staffers participate, the Republicans avoided learning the details that the Democrats learned [Update: I've been

informed the **Republicans attended the hearings**]. And note—they still seem to be focused on phone companies, not the email carriers who are the center of the new programs.

The letter also confirms what we've already known—not all carriers acted the same in response to Administration requests.

> The case for blanket retroactive immunity would be stronger if the various carriers had taken consistent actions in response to requests from the Administration. That is not what we found. Without revealing any specific details, we found a variety of actions at various times with differing justifications in response to Administration requests.

No word on whether anyone has contacted Nacchio's judge—who is having his own Spitzer-like problems—to inform him that Nacchio had a point when he said he may have lost his NSA contracts out of spite.

The letter also repeats a point AT&T made in its letter to Dingell et al—that the activities the telecoms were engaged in were covered under a number of different laws.

> If there were one simple, straightforward legal rule that applied to the conduct in question, it could perhaps be argued that it is a straightforward matter for the legislature to assess the lawfulness of the conduct in question. Without revealing any specific details, that is not what we found. **It appears that a variety of legal rules and regimes may apply to the conduct of the carriers**. We would note that one carrier has publicly stated that there are "numerous defenses and immunities reflected in existing statutory and case law" for companies that cooperate with legally authorized

> government surveillance requests. [my emphasis]

I was thinking when I read that letter that one thing AT&T was trying to do was describe the scope of the illegal program. I plan to go back and read those legal justifications more closely, but I recall the centrality of laws pertaining to pen registers among them, reinforcing the notion that the telecoms were also data mining. It sure sounds like they crafted together a mix of legal justifications to do what they did.

Most importantly, HJC makes a strong case to reject immunity (while allowing the telecoms to defend themselves—a stance that also responds to the sole reason SSCI felt it had to offer immunity), while calling for an independent committee to look into the illegal wiretapping.

> Accordingly, we support a resolution that would, notwithstanding the state secrets doctrine, authorize relevant carriers to present fully in court their claims that they are immune from civil liability under current law, with appropriate security protections to carefully safeguard classified information. This solution would ensure that carriers can fully present their arguments that they are immune under current law, while also ensuring that Americans who believe their privacy rights were violated will have the issue considered by the courts based on the applicable facts and law, consistent with our traditional system of government and checks and balances.
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> Our review has also led us to support two other recommendations. First, there is arguably a gap in liability protections for carriers that complied with lawful surveillance requests covering the time period between the expiration of the Protect America Act

> and the future enactment of more lasting FISA reform legislation. As Speaker Pelosi and Senate Majority Leader Reid have proposed, legislation to fill that gap is justified and important. This provision is not included in the Senate FISA bill, and shoul dbe included in any final legislative product.
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> In addition, our review of classified information has reinforced serious concerns about the potential illegality of the Administration's actions in authorizing and carrying out its warrantless surveillance program. We, therefore, recommend the creation of a bipartisan commission to conduct hearings and take other evidence to fully examine that program. Like the 9/11 Commission, it would make findings and recommendations in both classified and unclassified reports and thus inform and educate the American people on this troubling subject.

I like this approach: it undercuts the logic of SSCI's insistence on immunity, shows a concern for the prospective legal position of the telecoms, while putting something on the table—a bipartisan commission—that we can negotiate with if we ever have to cede on immunity.

Let's hope it's not too little too late.