

# DETAILS ON THE FISA “COMPROMISE”

CQ and WSJ are finally giving more details about what Steny and Jello Jay have concocted with their Republican buddies and telecom lobbyists. CQ confirms what we've been hearing—that the immunity would basically consist of a District Court reviewing the authorization, with almost no way to rule against the telecoms.

One source said the federal district court deciding on retroactive immunity would review whether there was "substantial evidence" the companies had received assurances from the government that the administration's program was legal.

And it appears that Steny's grand bargain consists solely of prospective review of the programs, rather than review as the program is being implemented.

Under the prospective deal, the secret court created by the original law would get to review, in advance, the process by which the administration chooses foreign surveillance targets who may be communicating with people in the United States.

Of course, note the word "process" here—it sounds like FISA still doesn't get to review the actual choices.

There's an interesting wrinkle in the WSJ version, though, that I find notable. The telecoms would have to prove that either the AG—or an intelligence agency head—signed off on the wiretap requests.

Critical to sealing the deal was a compromise that would grant conditional immunity to telecommunications companies for assistance they provided from

September 2001 through January 2007. If the companies can show a federal district court judge "substantial evidence" they received a written request from the attorney general **or head of an intelligence agency** stating the president authorized the surveillance and determined it to be lawful, the cases against them will be dismissed. [my emphasis]

That's an interesting detail, because up until now, we've been told that the Attorney General approved this program, with the sole exception of the period immediately following the hospital confrontation on March 10, 2004. After that confrontation, the SSCI had reported, the White House Counsel (yup—Alberto Gonzales) approved the program for a period of not more than 60 days.

As SSCI points out, the telecoms would be immune from prosecution if they had been authorized to conduct wiretaps under 18 U.S.C. § 2511(2)(a)(ii).

Under the existing statutory scheme, wire or electronic communication providers are authorized to provide information and assistance to persons with authority to conduct electronic surveillance if the providers have been provided with (1) a court order directing the assistance, or (2) a certification in writing signed by the Attorney General **or certain other officers** that —no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.|| See 18 U.S.C. § 2511(2)(a)(ii).

I've bolded those words, "or certain other officers," to emphasize that Jello Jay and the Republicans didn't actually specify what the law says. So let's look at the law, shall we?

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

The law says that only the AG or someone specified in 2518(7) may provide the telecoms with the certification that their actions are legal. Here's what 2518(7) says:

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by **the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney** of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that— [my emphasis]

So the only people who may give telecoms the authorization that their eavesdropping is legal are: the AG, the DAG, the AAG, and any principal prosecuting attorney, such as a USA **[Actually, maybe this means a State AG]**.

Yet, as the report informs us, for a period of time (a period of time, I might add, at some remove from 9/11), **none** of those people had signed off on the wiretapping program. After the Deputy Attorney General, as the Acting Attorney General refused to endorse the legality of the program, Alberto Gonzales authorized it.

The Committee can say, however, that beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence activities that had been

authorized by the President.

The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. **All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.** [my emphasis]

But Alberto Gonzales was not then one of the named people who could authorize such wiretaps. He was an attorney, but not a prosecuting attorney. In fact, at the time, he was not a law enforcement officer at all (unless you count someone enforcing Cheney's law as a law enforcement officer).

So now we're to believe that it was not Gonzales' say-so that made the program "legal," it was the say-so of the head of an intelligence agency (either NSA or CIA)?

How come I get the feeling that J Edgar Hoover would love this kind of immunity, that said that the President and an intelligence head could decide to spy on citizens if they wanted to?

Christy says the bill number will be HR 6304, but I can't find it yet on Thomas.