

HINTS THAT THE FISCR PLAINTIFF IS AN EMAIL PROVIDER

I've said in the last two threads on the FISCR opinion that the plaintiff is an email provider. Here's why I believe that to be true.

On February 29, 2008, the Computer & Communications Industry Association wrote the Members of the House (which was then considering its own amendments to FISA, distinct from those that had been already passed in the Senate), lobbying against retroactive immunity. CCIA, recall, is the trade group for a bunch of tech companies, including email providers Yahoo, Microsoft, and Google. That letter reads:

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]

On February 29, 2008, at a time when the plaintiff in this case was almost certainly actively pursuing the case (I'll do a review of timing in a later post), the trade association for the country's biggest free email providers was lobbying:

- Against retroactive immunity for those companies participated in violations of federal law, suggesting that the trade organization believed earlier cooperation was clearly illegal
- For prospective immunity, which had been included in PAA and was included in every FISA amendment ever contemplated, suggesting that association members intended to cooperate going forward
- For "bright lines" describing the requirements for cooperation with the

government, suggesting that association members cared first and foremost about the clarity of the law and believed the law, in the past, had not been clear

If that doesn't, by itself, convince you that a member of the CCIA was the company objecting to the government's byzantine assault on the Fourth Amendment, in discussions I had about this letter with a number of people, I learned that there were hints of an email provider fighting orders in the FISA courts.

I believe this suit is the rumored suit.

In other words, when you read the opinion and see the concerns about particularity, understand that we're almost certainly talking about email servers, and not phone calls among individuals.