

Tannenbaum, Andrew

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From: Demers, John
 Sent: Tuesday, April 08, 2008 6:33 PM
 To: [REDACTED] Nichols, Carl (CIV); Eisenberg, John; Gerry, Brett
 Subject: FW: FISA immunity alternative.doc
 Attachments: FISA immunity alternative (2)(1).doc

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Exemption 5

From: [REDACTED]
 Sent: Tuesday, April 08, 2008 5:04 PM
 To: Demers, John
 Subject: RE: FISA immunity alternative.doc

John:

Sorry for the delay, but I wanted to give you back my considered thoughts on this.

I think overall it works well. I have (in the way of lawyers) some ideas to suggest. These are in descending order of importance.

1. Damages Cap. As it stands, the provision limiting damages and attorneys' fees has a \$25M limit [REDACTED]. So I've attempted to revise to ensure that the limit applies only once for an entire family of affiliated companies and persons.
2. "Described In." I have changed the "described in" language to "the subject of".
3. Addressing Possible Future Covered Civil Actions. Under the legislation, the Attorney General could continue to submit applications addressing any follow on suits. But one could imagine new actions being filed after a change in Administration in January 2009. Whether the Attorney General in a new administration would provide the requisite applications—even if there is a basis to do so—is uncertain. To address this concern, I've suggested language to make it mandatory for the Attorney General to file an application if the conditions of § 202 (a)(1)(A) or (B) are satisfied. I have also modified the severability provision to expressly save paragraph 202(a)(2), which requires the Attorney general to file an application.
4. Application vs. Submission. If (a)(1) is found unconstitutional, there will be nothing to "apply" for in the kind of future cases described in 2 immediately above. So I've changed "application" to "submission" so that, in conjunction with the changes described in 2, the damages limitation can remain viable if the worst happens.
5. Evidentiary Concerns. In order to try to avoid evidentiary challenges to the Attorney General's declaration, I permit him to base his assertions on a reasonable inquiry and expressly make his declaration admissible. I have also tried to clarify that the FISC's review will be based only on the facts submitted in an application by the Attorney General.
6. Finality. I am not sure what a "complete and final" decision is . . . is it different than a "final" decision? I have deleted "complete and" but this really is just for your consideration.
7. Court of Review. I have further clarified that its jurisdiction is exclusive.
8. In subsection (g), I think the references to "(b) and (e)" probably should be to "(b) and (f)" since the stay will continue by its own terms.

I am available should you wish to discuss.

Thanks again.'

[REDACTED]

[REDACTED]

PRIVILEGED ATTORNEY WORK PRODUCT
DO NOT FORWARD

From: Demers, John [mailto:[REDACTED]@usdoj.gov]
Sent: Friday, April 04, 2008 7:08 PM
To: [REDACTED]
Subject: FISA immunity alternative.doc

[REDACTED]

Per our discussion. These first thoughts are a very close hold and have not been vetted.

Thanks,
John

<<FISA immunity alternative.doc>>

SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS.

(a) Limitations.—

(1) IN GENERAL.—Notwithstanding any other provision of law, a covered civil action shall not lie or be maintained in a Federal or State court, and shall be promptly dismissed, if the Foreign Intelligence Surveillance Court determines, upon review of a submission, by the Attorney General, that—

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(A) the assistance alleged to have been provided by the electronic communication service provider was—

(i) in connection with an intelligence activity involving communications that was—

(I) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(II) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(ii) the subject of, a written request or directive from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was—

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(I) authorized by the President; and

(II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) ATTORNEY GENERAL SUBMISSION.—If the conditions of § 202(a)(1)(A) or (B) are satisfied, the Attorney General shall promptly submit to the Foreign Intelligence Surveillance Court—

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(A) a declaration by the Attorney General, (pursuant to section 1746 of title 28, United States Code) setting forth, based on reasonable inquiry, any applicable facts described in subsection (a)(1); and

(B) copies of any written request or directive that the Attorney General relies upon in seeking dismissal under subsection (a)(1)(A).

Such information shall be admissible and shall constitute the record to be considered by the Foreign Intelligence Surveillance Court in making its determination under subsection (a)(1).

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(b) Review of Submissions.—A court reviewing, directly or on appeal, a submission pursuant to §202(a)(2), shall—

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(1) review the information provided to the Court by the Attorney General under

subsection (a) in camera and ex parte; and

(2) limit any public disclosure concerning such information, including any public order following such an ex parte review, to a statement that the conditions of subsection (a) have been met, without disclosing the subparagraph of subsection (a)(1) that is the basis for the application or whether written requests or directives were provided pursuant to subsection (a)(2).

(c) Nondelegation.—The authority and duties of the Attorney General under this section shall be performed by the Attorney General (or Acting Attorney General) or a designee in a position not lower than the Deputy Attorney General.

(d) Jurisdiction.—Upon receiving a submission of the Attorney General for any covered civil action, the Foreign Intelligence Surveillance Court shall have exclusive jurisdiction to make the determination in subsection (a) and to hear any challenge in such action to the validity or application of this section. Other than the Foreign Intelligence Surveillance Court, the Foreign Intelligence Surveillance Court of Review and the Supreme Court, no court shall have jurisdiction to hear any challenge brought by any party to the validity or application of this section.

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(e) Stay of Other Proceedings.— Within 10 days of the Attorney General's submission under paragraph (a)(2), the United States shall notify the district court and any appellate court in which the covered civil action is pending, and all proceedings in the action before such courts shall be stayed by those courts. Such stay shall remain in effect until the Foreign Intelligence Surveillance Court renders a final determination in any proceeding under this section for such covered civil action. The stay shall also remain in effect during the pendency of any appeal taken in such action pursuant to subsection (g).

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(f) Participation of Parties.—The plaintiffs and defendants in a covered civil action shall be permitted to participate in the briefing or argument of any legal issue in a Foreign Intelligence Surveillance Court proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of, or otherwise tend to reveal, classified information to such party. To the extent that classified information is relevant to the proceeding or a determination of an issue, the court shall review such information or make such determination in camera and ex parte.

(g) Appeal.—

(1) APPEAL TO THE COURT OF REVIEW.—The United States or any other party in a covered civil action may file a petition with the Foreign Intelligence Surveillance Court of Review for review of any final determination of the Foreign Intelligence Surveillance Court issued pursuant to this section. The Foreign Intelligence Surveillance Court of Review shall have exclusive jurisdiction to consider such a petition. Subsections (b) and (f) shall apply to any Foreign Intelligence Surveillance Court of Review proceedings.

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(2) CERTIORARI TO THE SUPREME COURT.—The United States or any other party in a covered civil action may file a petition for a writ of certiorari for review of any decision of the Foreign Intelligence Surveillance Court of Review issued under subsection (g)(1). The Supreme Court of the United States shall have jurisdiction to review such decision, and subsections (b) and (f) shall apply to any such proceedings.

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(h) Expedited Review.—The Foreign Intelligence Surveillance Court shall issue a final determination in any proceeding under this section within 180 days of receiving the Attorney General's submission. The Foreign Intelligence Surveillance Court of Review and Supreme Court shall expedite any appeal taken pursuant to subsection (g).

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(i) Further Proceedings.—If, after the Foreign Intelligence Surveillance Court renders a final determination and any appeals taken pursuant to subsection (g) are exhausted, it is determined that the conditions of subsection (a) have been met, then the court in which the action was pending prior to the Attorney General's application shall dismiss the case with prejudice and no other appeals in the action shall be permitted. If, after the Foreign Intelligence Surveillance Court renders a final determination and any appeals taken pursuant to subsection (g) are exhausted, it is determined that the conditions of subsection (a) have not been met, the stay required by subsection (e) shall be lifted and the court in which the action was pending prior to the Attorney General's application shall proceed as it deems appropriate, without prejudice to any available immunity, privilege, or defense available to any party.

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(j) Damages and Attorneys' Fees.—

(1) Notwithstanding any other provision of law, the maximum amount of potential liability of an electronic communications service provider (as defined under § 201(4)(A)-(F)) for claims in covered civil actions in which the Attorney General files a submission under subsection (a)(2) shall be twenty-five million dollars in aggregate for all such actions brought against it or its parents, subsidiaries, affiliates, successors and assignees. Attorneys' fees shall be limited to 10 percent of the damages awarded.

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(2) If any other provision of this section or the application of any provision of this section to any person or circumstances is held invalid, the validity of this subsection and paragraph (a)(2) or the application of any provision of this section to other persons and circumstances, shall not be affected thereby.

(k) Civil Actions in State Court.—A covered civil action that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under section 1441 of title 28, United States Code.

(l) Rule of Construction.—Nothing in this section may be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

(m) Effective Date and Application.—This section shall apply to any covered civil action that is pending on or filed after the date of enactment of this Act.

Tannenbaum, Andrew

From: Demers, John
Sent: Tuesday, April 22, 2008 11:57 AM
To: Nichols, Carl (CIV); [REDACTED]
Subject: FW: Proposed Options to Modify Title II

Exemption 6

Attachments: Modification to Title II Proposal No. 1 (4-22-08).DOC; Modification to Title II - Proposal No. 2 (4-22-08).DOC



Modification to Title II Proposal No. 1 (4-22-08).DOC; Modification to Title II - Proposal No. 2 (4-22-08).DOC

-----Original Message-----

From: Burck, William A. [mailto:William_A._Burck@who.eop.gov]
Sent: Tuesday, April 22, 2008 11:51 AM
To: (b)(6); Demers, John; Gerry, Brett
Subject: Fw: Proposed Options to Modify Title II

----- Original Message -----

From: Frech, Christopher W.
To: Burck, William A.
Cc: Kim, Harold H.; Emling, John G.; Meyer, Daniel P.
Sent: Tue Apr 22 11:17:38 2008
Subject: FW: Proposed Options to Modify Title II

Bill here is some language ideas being floated that we have been asked to review. Can you please circulate to the FISA crew for review.

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, April 22, 2008 11:02 AM
To: bjackson@georgewbush.com; Frech, Christopher W.; l_tucker@ssci.senate.gov
Subject: Fw: Proposed Options to Modify Title II

Here are some ideas we are thinking about. I would like your feedback. We are NOT sharing this with anyone else until I/we have come up with an approach to use this.

[REDACTED]

----- Original Message -----

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Sent: Tue Apr 22 09:34:08 2008
Subject: Proposed Options to Modify Title II

Attached are two proposals to modify Title II of the Senate bill. The first option is preferred.

* The first option would retain the basic structure of the Senate bill. The Attorney General would submit a certification to the district court that the carrier defendant either did not provide the assistance as alleged, or did so in connection with a counter-terrorism program authorized by the president and pursuant to written assurances of legality.

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[Signature]

* But unlike in the current Senate bill, under which the district court would review the AG's certification for an abuse of discretion, the matter would be transferred to the FISA Court (FISC), which would evaluate whether the AG's conclusions were arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence. If the FISC were to find that the AG's conclusions were supported, the case would be remanded back to the district court for mandatory dismissal consistent with the other provisions of the title.

* There are a number of benefits to this approach.

* First, the FISC has greater substantive expertise in dealing with matters of national security and the legal framework surrounding private-party assistance with intelligence programs. Better than any other Article III court, the FISC will be able to fully and fairly assess the propriety of the AG's conclusions and certifications.

* Second, having a single court make all of the review decisions will ensure substantive and procedural consistency. Otherwise, later cases that might be filed in disparate courts may receive inconsistent and conflicting treatment in connection with the same basic facts. This would be especially trouble in this national security context.

* Third, because the FISC has established, proven procedures for handling and resolving classified matters, the AG will be comfortable relying on a more expansive record in making his certification decision than he might if forced to deal solely with the district court -- or multiple district courts. In turn, the reviewing court will enjoy a more complete record in determining whether the AG's conclusions were supported.

* Fourth, this framework includes a clear appellate process. (Section 202(a)(4)) Any decision of the FISC could be appealed directly to the FISA Court of Review (FISCOR). A party could then petition for a writ of certiorari to the Supreme Court for review of any FISCOR decision.

* In addition, those who have been opposed to the language in the current Senate bill should see a number of benefits to this revised approach.

* First, the proposal clearly articulates the role of the court in reviewing the AG's certification. The court would be able to apply any one of three normative standards. (Section 202(a)(3)(B)) In addition, the proposal makes unmistakably clear that the reviewing court would be given access to the same information upon which the AG relied in issuing his certification. (Section 202(a)(3)(D)) In short, this puts to rest any notion that the court review under Title II would simply be a rubber-stamp of the AG's certification.

* Second, the proposal should appeal to those (e.g., Sen. Feinstein), who believe that the FISA Court should have a meaningful role in this process. Yet, this formulation would not contain the same defects as proposals offered during the Senate debate that would have led to an adversarial litigation process in the FISC, which is not constituted to handle such proceedings.

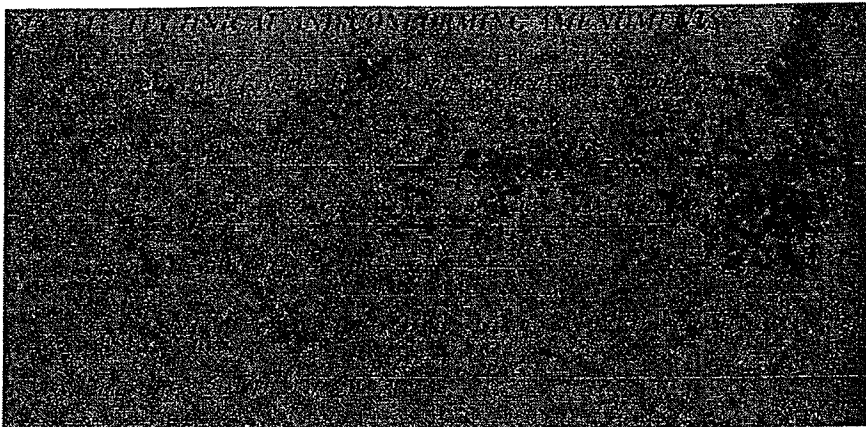
* Third, the proposal would expressly grant the plaintiffs the right to appear before the FISC. (Section 202(a)(3)(E)) While the bill would retain limits such that the FISC would not be able to share classified materials with plaintiffs or defendants (Section 202(b)), the plaintiffs would be able to petition the court and perfect and pursue any appeals of the FISC's or FISCOR's decisions.

* The second proposal is more modest and would not transfer any portion of the case to the FISC. Rather, it would expand Section 202(a)(2) of the current bill to more clearly express the role of the court in reviewing the AG's certification and make it unmistakably clear that the reviewing court would be given access to the same information upon which the AG relied in issuing his certification. That is, it contains a subset of the c
<<Modification to Title II Proposal No. 1 (4-22-08).DOC>> han <<Modification to Title II - Proposal No. 2 (4-22-08).DOC>> ges contained in the broader proposal.

<<Modification to Title II Proposal No. 1 (4-22-08).DOC>>
<<Modification to Title II - Proposal No. 2 (4-22-08).DOC>>



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TITLE II--PROTECTIONS FOR ELECTRONIC COMMUNICATION

SERVICE PROVIDERS

SEC. 201. DEFINITIONS.

In this title:

(1) ASSISTANCE. -- The term "assistance" means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

(2) CONTENTS. -- The term "contents" has the meaning given that term in section 101(n) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(n)).

(3) COVERED CIVIL ACTION. -- The term "covered civil action" means a civil action filed in a Federal or State court that --

1 (A) alleges that an electronic communication service
2 provider furnished assistance to an element of the intelligence
3 community; and

4 (B) seeks monetary or other relief from the electronic
5 communication service provider related to the provision of such
6 assistance.

7 (4) ELECTRONIC COMMUNICATION SERVICE PROVIDER

8 -- The term "electronic communication service provider" means --

9 (A) a telecommunications carrier, as that term is defined
10 in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

11 (B) a provider of an electronic communication service, as
12 that term is defined in section 2510 of title 18, United States Code;

13 (C) a provider of a remote computing service, as that term
14 is defined in section 2711 of title 18, United States Code;

15 (D) any other communication service provider who has
16 access to wire or electronic communications either as such
17 communications are transmitted or as such communications are
18 stored;

19 (E) a parent, subsidiary, affiliate, successor, or assignee of
20 an entity described in subparagraph (A), (B), (C), or (D); or

21 (F) an officer, employee, or agent of an entity described
22 in subparagraph (A), (B), (C), (D), or (E).

1 (5) ELEMENT OF THE INTELLIGENCE COMMUNITY. --

2 The term "element of the intelligence community" means an element of
3 the intelligence community specified in or designated under section 3(4)
4 of the National Security Act of 1947 (50 U.S.C. 401a(4)).

5 **SEC. 202. LIMITATIONS ON CIVIL ACTIONS FOR ELECTRONIC**
6 **COMMUNICATION SERVICE PROVIDERS.**

7 (a) LIMITATIONS. --

8 (1) IN GENERAL. -- Notwithstanding any other provision of
9 law, a covered civil action shall not lie or be maintained in a Federal or
10 State court, and shall be promptly dismissed, if the Attorney General
11 certifies to the court that --

12 (A) the assistance alleged to have been provided by the electronic
13 communication service provider was --

14 (i) in connection with an intelligence activity involving
15 communications that was --

16 (I) authorized by the President during the period
17 beginning on September 11, 2001, and ending on January 17,
18 2007; and

19 (II) designed to detect or prevent a terrorist attack,
20 or activities in preparation for a terrorist attack, against the
21 United States; and

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(ii) described in a written request or directive from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was --

- (I) authorized by the President; and
- (II) determined to be lawful; or

(B) the electronic communication service provider did not provide the alleged assistance.

(2) SUBMISSION OF CERTIFICATION. -- If the Attorney General submits a certification under paragraph (1), the court to which that certification is submitted shall --

(A) immediately transfer the matter to the Foreign Intelligence Surveillance Court for a determination as described in paragraph (3)(A); and

(B) stay further proceedings in the litigation, pending the determination of the Foreign Intelligence Surveillance Court and the resolution of any appeals pursuant to paragraph (4).

(3) REVIEW OF CERTIFICATION BY THE FOREIGN INTELLIGENCE SURVEILLANCE COURT. --

(A) The Foreign Intelligence Surveillance Court shall, pursuant to subparagraph (B), review the certification by the Attorney General submitted under paragraph (1).

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(B) The Foreign Intelligence Surveillance Court shall set aside and give no force or effect to such certification if it determines that the Attorney General's conclusions are:

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- (i) arbitrary and capricious;
- (ii) an abuse of discretion; or,
- (iii) unsupported by substantial evidence.

(C) If such certification is not set aside under subparagraph (B), the certification shall be deemed valid, and, subject to and following any appeal pursuant to paragraph (4), the case remanded to the district court for dismissal pursuant to subparagraph (a)(1).

(D) In making the determination pursuant to this paragraph, the Foreign Intelligence Surveillance Court shall have the power to review the information upon which the Attorney General relied in issuing the certification.

(E) In reviewing a certification and making a determination under this paragraph, the Foreign Intelligence Surveillance Court shall permit any plaintiff and any defendant in the applicable covered civil action to appear before the Foreign Intelligence Surveillance Court, consistent with the procedures described in section (b).

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(4) APPEAL.

(A) A party to a proceeding described in paragraph (3) may appeal a determination under that paragraph within 30 days to the

1 , Foreign Intelligence Surveillance Court of Review, which shall have
2 exclusive jurisdiction to review such determination.

3 (B) A party to an appeal under subparagraph (A) may file a
4 petition for a writ of certiorari with the Supreme Court of the United
5 States for review of a decision of the Foreign Intelligence Surveillance
6 Court of Review issued under that subparagraph. If the petition is
7 granted, the record for such review shall be transmitted under seal to the
8 Supreme Court of the United States, which shall have jurisdiction to
9 review such decision.

Deleted: shall be subject to review by a court for abuse of discretion.

11 (b) REVIEW OF CERTIFICATIONS. -- If the Attorney General files a
12 declaration under section 1746 of title 28, United States Code, that disclosure of
13 a certification made pursuant to subsection (a) would harm the national security
14 of the United States, all reviewing courts shall --

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15 (1) review such certification in camera and ex parte; and
16 (2) limit any public disclosure concerning such certification,
17 including in any public order following such an ex parte review, to a
18 statement that the standards of subsection (a)(3)(B) have or have not been
19 satisfied.

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20 (c) NONDELEGATION. -- The authority and duties of the Attorney
21 General under this section shall be performed by the Attorney General (or Acting

1 Attorney General) or a designee in a position not lower than the Deputy Attorney
2 General.

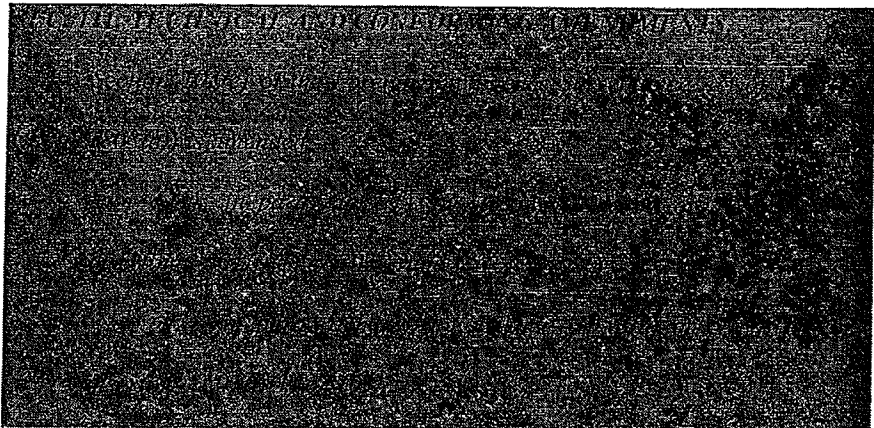
3 (d) CIVIL ACTIONS IN STATE COURT. -- A covered civil action that
4 is brought in a State court shall be deemed to arise under the Constitution and
5 laws of the United States and shall be removable under section 1441 of title 28,
6 United States Code.

7 (e) RULE OF CONSTRUCTION. -- Nothing in this section may be
8 construed to limit any otherwise available immunity, privilege, or defense under
9 any other provision of law.

10 (f) EFFECTIVE DATE AND APPLICATION. -- This section shall
11 apply to any covered civil action that is pending on or filed after the date of
12 enactment of this Act.

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TITLE II—PROTECTIONS FOR ELECTRONIC COMMUNICATION

SERVICE PROVIDERS

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(3) COVERED CIVIL ACTION. -- The term "covered civil action" means a civil action filed in a Federal or State court that --

1 (A) alleges that an electronic communication service
2 provider furnished assistance to an element of the intelligence
3 community; and

4 (B) seeks monetary or other relief from the electronic
5 communication service provider related to the provision of such
6 assistance.

7 (4) ELECTRONIC COMMUNICATION SERVICE PROVIDER

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14 is defined in section 2711 of title 18, United States Code;

15 (D) any other communication service provider who has
16 access to wire or electronic communications either as such
17 communications are transmitted or as such communications are
18 stored;

19 (E) a parent, subsidiary, affiliate, successor, or assignee of
20 an entity described in subparagraph (A), (B), (C), or (D); or

21 (F) an officer, employee, or agent of an entity described
22 in subparagraph (A), (B), (C), (D), or (E).