

TITLE II- IMMUNITY FOR ELECTRONIC COMMUNICATION SERVICE PROVIDERS

SECTION 201: DEFINITIONS

Employs traditional definitions of electronic service providers (ECPs). Defines their “assistance” as “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.”

Defines covered civil actions as any state or federal court action seeking money or other relief against an ECP.

SECTION 202: RETROACTIVE IMMUNITY FOR ILLEGAL WIRETAPPING

Allows the AG to kill state and federal court cases by certifying that either 1) the ECP did not participate in surveillance activities, or 2) that it did so between September 11, 2001 and January 17, 2007, and participated in reliance on a written assertion by the President that the activity was legal. Such a certification can only be reviewed by the court for abuse of discretion.

Allow the AG or deputy AG to make the above certifications ex parte and in camera, and requires the court to dismiss the case without clarifying whether the case was dismissed because the ECP did not participate or because the President provided a written certification. .

Declares that all state actions are removable to federal court.

Applies to all cases pending at the time of passage and field thereafter.

PROBLEMS: Lets the AG single handedly decide whether consumers can seek justice in state or federal court to determine whether they have been spied upon or even seek an injunction from happening in the future. Those courts will literally have no say about whether cases should continue. Completely hides ECP involvement in spying by gagging the court from distinguishing between those cases that are killed because the ECP didn't spy, and those cases that the AG just wants buried to hide liability. Cases will be dismissed even if they do not seek money damages but only declaratory and injunctive relief. Writes into law the executive branch's unlimited power to shield an entire industry without any public airing of facts.

SECTION 203: PROSPECTIVE IMMUNITY FOR ECPS

Creates a new Title VIII to FISA:

Sec. 801: Definitions

Sec. 802: Allows the AG to kill any case against someone who assists the intelligence community – an ECP, a landlord, or other custodian, for example – by certifying to the court that the person was acting in accordance with a government order under FISA or Title 18.

Again, allows the AG to make this certification in secret, and prevents the court from publicly announcing under which authority the activities took place and therefore led to dismissal.

Also the federal government is empowered to remove all state cases to federal court.

PROBLEMS: Allows the AG to single handedly – and preemptively – prevent Americans from asserting their rights in court. Literally, if the AG says spying is legal, it is legal, and no court will ever be able to hear facts asserting otherwise.

SECTION 204: PREEMPTION OF STATE INVESTIGATIONS

Sec. 803: Declares that no state may conduct an investigation into an ECP's cooperation with the intelligence community; attempt to regulate intelligence activities; impose punishment for cooperating with the government; or bring a civil action that will lead to disclosure of information about intelligence activities.

The federal government may bring suit to enforce this in federal district court.

Applies to investigations active on and after the date of passage.

PROBLEMS: Retroactively and prospectively prevents states from enforcing their own privacy laws. Will kill current state level investigations into whether laws have been broken by the warrantless spying facilitated by ECPs.