DIFI'S AMENDMENT

I raised DiFi's rather interesting amendment to the FISA bill in this post. Now that the transcripts are up from yesterday's debate, I'd like to fine tune what I said about the amendment.

First, I was mistaken when I told a few people that Leahy and Jello Jay were co-sponsors of DiFi's amendment. They are co-sponsors of her exclusivity amendment, but only Bill Nelson is co-sponsor of her immunity amendment.

> I ask unanimous consent that Senator Nelson of Florida be added as a cosponsor of the FISA Court evaluation on the immunity question amendment.

Second, here's what DiFi says about her reluctance to vote for the bill with immunity that doesn't include her amendment.

> I voted for telecom immunity in the committee. I am not inclined to vote for it, to be candid with you, unless this amendment is adopted.

Not an absolute commitment, particularly coming from DiFi. But a start, at least.

Now here's her description of what her amendment says. She starts with a characterization of the immunity included in the SSCI bill:

> So let me begin by talking about the immunity provision of the bill. It is not as expansive as some would make it sound. The language **would only cover cases where the Attorney General certifies** that the defendant companies **received written requests or directives from top levels of the Government** for their assistance.
>
> In other words, the Government, in writing, I stress in writing, assured

> those companies that the program was legal, the President had authorized the program, and that its legality has been approved by the Attorney General.

DiFi's first paragraph is curious. It describes immunity broadly, including "written requests" or "directives"—I can't tell whether the "directives" here, given the context, are written or not. She further says it would cover those who got these written and possibly non-written requests from "top levels of Government," but doesn't specify that, by law, the immunity should be restricted to those who received written requests from the AG.

That said, I'm not sure what her following paragraph means. Is it conditional, implying that companies would only get immunity if they had something in writing. Or does DiFi's, "I stress, in writing," mean the companies did, in fact, get something in writing? Also, her second paragraph seems to imply that only those who got authorization beforehand from the AG would qualify for immunity, which is different from what her first paragraph says.

She then goes onto describe how the poor helpless telecoms are handcuffed by the Bush Administration's invocation of State Secrets and goes so far as to claim that the telecoms got nothing out of this relationship.

> These companies have no financial motives in providing assistance to the Government.

Uh huh. They just opened an entirely new line of business with the government, that will last for the foreseeable future, but there was no financial incentive. Uh huh.

DiFi then returns to the issue of written versus oral requests, stating that the requests the telecoms got just after 9/11 were written.

> They were given written requests, legal

> assurances in the weeks after September 11.

Though that doesn't clarify whether all the requests were written or whether—at the time when the Acting AG believed the program to be illegal—the telecoms relied on an oral request from someone other than the AG, someone like Gonzales.

DiFi goes on to emphasize how few people were actually read into the program, suggesting that, like Jello Jay and John Ashcroft, the telecoms just couldn't review the action with people who could tell them the action was illegal.

> It has been pointed out that there is a longstanding common law provision that allows citizens to rely on the assumption that the Government acted legally when it asks a private citizen or a company to assist it for the common good. All that is required is that the citizen act in good faith.
>
> So the question is whether the small number of people, and it was a small number of people, who were actually cleared in a classified sense, to deal with this, of these companies, were acting in good faith and whether it was reasonable for them to determine that the assistance, in fact, it provided was legal.
>
> A small number of telecom officials were acting under the cloak of secrecy and a directive not to disclose the Government's request.

It appears, from what DiFi said, that the authorizations themselves admitted they were relying on Article II authority, rather than on FISA. That is, it appears that the authorizations admitted that the wiretaps were not legal under FISA or any other statute, but relied exclusively on Article II for their

authority.

> They are not experts on article II of the Constitution.

Now, if that wasn't enough to alert the telecom executives there was a problem, it's their own damn fault, IMO.

So, against this background, DiFi presents the intent of her amendment:

> The amendment I am going to submit would put before the FISA Court the question of whether the telecommunications companies should, in fact, receive immunity based on the law.
>
> The FISA Court would be required to act, en banc, and how this is, is 15 judges, Federal judges, appointed by the Chief Justice, they sit 24/7, and this is all they do, they would act en banc. They would look at the following: **Did the letters sent to the carriers which were repeated virtually every 35 to 45 days over the last 4 to 5 years, did the letters sent to the carriers meet the conditions of law**.
>
> Section 2511 of title 18 clearly states that a certification from the Government is required in cases where there is no court order. That is the only two ways that FISA allows this to proceed, by written certification or by court order.
>
> The Government has to certify in writing that all statutory requirements for the company's assistance have been met. **So the FISA Court would first look at whether the letter sent to the companies met the terms of this law**. The court would then look at, if the companies provided assistance, was it done in good faith and pursuant to a belief that the compliance was legal.
>
> Finally, the FISA Court would ask: Did

> the defendants actually provide assistance? If the FISA Court finds that defendant did not provide any assistance to the Government or that the assistance either met the legal requirements of the law or was reasonably and in good faith, the immunity provision would apply.
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> If the FISA Court finds that none of these requirements were met, immunity would not apply to the defendant companies. I think the merit of this approach is it preserves judicial review, the method we look at in order to decide questions of legality.
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> Now, the bulk of the Members of this body, probably 90 percent of them, have not been able to see the written certification, so you do not know what was there. What we ask in this amendment is: **FISA Court, you take a look at these letters, and you make a ruling as to whether they essentially meet the certification requirements of the FISA law**.
>
> Therefore, there is judicial review to determine whether, under existing law, this immunity should be forthcoming. It is a narrowing of the immunity provisions of the Intelligence bill. I think it makes sense. I read the letters. I am a layperson, I am not a lawyer. **I cannot say whether they met the immunity provisions**. Others can say that.
>
> But it should be up to a court to make that decision. It seems to me that if the FISA Court finds that none of these requirements were met, immunity would not apply to the defendant companies.

It's a surprisingly honest position from DiFi (which is why I suspect she'll abandon it). If Congress were to give the telecoms immunity,

after all, they'd be making themselves judge and jury. Yet DiFi, at least, has no clue whether the telecoms qualify for immunity or not. DiFi's amendment asks a court—a secret court, but significantly, a court against which BushCo cannot invoke State Secrets—to be the judge and jury in this matter.

And as I said earlier, given that one of the letters was not signed by any of the people authorized to sign such a letter, there seems to be a high likelihood that the FISA Court would rule that one authorization—presumably from March 11—to not meet the standards of the law. Therefore, the telecoms would be liable at least for the wiretapping that occurred under that authorization. And that's before the FISA Court even considers these authorizations that are apparently based on Article II power.

Then DiFi gets to the really neat part of this amendment—a direct request that the FISA Court on the limits of the President's Article II power to wiretap Americans.

> The FISA Court of Review stated in 2002 that the President has article II authorities to conduct surveillance. The article II authority is the big rub in all this. The collection under this program was directed overwhelmingly at foreign targets.
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> But no court has addressed this issue since FISA was enacted in 1978. And, candidly, I think the time has come to see whether the President's article II authority—and the FISA Court would be the first judge of this—in fact, supersedes the article II authority based on the reading that I had given you of FISA Court passage in 1978.
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> So essentially that is the amendment I would like to send to the desk at this time which narrows the immunity provision of the FISA law.

This is the last thing BushCo wants out of their immunity provision. I'm fairly confident their apparent refusal to appeal the FISA Court's adverse ruling(s) from earlier this year stems from a desire not to have the FISC Review Court rule against them. So to invite the FISA Court to make a determination of whether and where the President has Article II power … Dick Cheney can't be happy about this.

Now, mind you, I'm not holding my breath for this to pass (I'm going to do a review of Orrin Hatch's reaction to this proposal later). I'm not going to bet one red cent that DiFi isn't going to disappoint me again.

But it is an intriguing proposal nevertheless.