

THINK OUTSIDE THE BOX

The ACLU says this about the House's proposed compromise on FISA.

While we still have concerns about aspects of the new House FISA bill, the American Civil Liberties Union is encouraged by the new draft – particularly the language on state secrets, which would allow the cases to go forward while allowing the telecommunications companies to assert any defenses. We commend House leadership for keeping the courthouse door open.

I think this is what they're referring to:

SEC. 802. PROCEDURES FOR COVERED CIVIL ACTIONS.

(a) INTERVENTION BY GOVERNMENT.— In any covered civil action, the court shall permit the Government to intervene. Whether or not the Government intervenes in the civil action, the Attorney General may submit any information in any form the Attorney General determines is appropriate and the court shall consider all such submissions.

(b) FACTUAL DETERMINATIONS.— In any covered civil action, the court shall review in accordance with the procedures set forth in section 106(f) any evidence or information with respect to which a privilege based on state secrets is asserted, whether that evidence or information is submitted by any party or the Government. The court may, on motion of the Attorney General, take any additional actions the court deems necessary to protect classified information. In order to ensure full argument of all legal issues, the court shall, to the extent practicable and

consistent with national security, request that any party present briefs and arguments on any legal question the court determines is raised by such a submission even if that party does not have full access to such submission. The court shall consider whether the employment of a special master or an expert witness, or both, would facilitate proceedings under this section.

(c) LOCATION OF REVIEW.—The court may conduct the review in a location and facility specified by the Attorney General as necessary to ensure security.

(d) REMOVAL.—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.

(e) SPECIAL RULE FOR CERTAIN CASES.—For any covered civil action alleging that a person provided assistance to an element of the intelligence community pursuant to a request or directive during the period from September 11, 2001 through January 17, 2007, the Attorney General shall provide to the court any request or directive related to the allegations under the procedures set forth in subsection (b).

(f) APPLICABILITY.—This section shall apply to a civil action pending on or filed after the date of the enactment of this Act.

I'm curious to see what the legal types around these parts think. But it seems that it challenges immunity advocates to put their money where their mouth is. For a long time, immunity advocates have argued that those poor little telecoms couldn't defend themselves because the

government invoked state secrets.

Well, says Congress, simply have the courts review the materials about which the government has invoked state secrets. Voila, problem solved.