



## Prepared Statement of Eff Senior Staff Attorney Kevin Bankston on Immunity “Compromise”

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My name is Kevin Bankston. I’m a senior staff attorney at the Electronic Frontier Foundation and one of the lead attorneys on *Hepting v. AT&T*, a class action lawsuit brought on behalf of the millions of AT&T customers—ordinary Americans—whose private domestic communications and communications records were illegally handed over to the National Security Agency by AT&T.

EFF, with ACLU, has also been appointed as co-coordinating counsel for all 47 of the outstanding lawsuits concerning the President’s warrantless surveillance program, including 35 other suits against telecoms like AT&T, Verizon and Sprint for their illegal cooperation in the domestic spying. I’m happy to give an update on the telecom litigation in Q&A—the short answer is that everything is currently stayed, and nothing much of note is happening or has happened for many months—but that’s not why I’m here this morning.

I’m here this morning to warn that, whatever gloss might be put on it, the so-called “compromise” on immunity for phone companies that broke the law is anything but a compromise, and that Congress appears poised to needlessly toss the rule of law out the window and deprive these millions of ordinary Americans of their day in court. My one simple message is that no matter how they spin it, this is still immunity, period.

Indeed, there’s an easy litmus test that everyone can use when evaluating this proposal or any other: does it allow the court to rule on the legality of the surveillance? That is, does it allow the plaintiffs to obtain a public decision on whether the companies broke the law, and if they did, to get an injunction to stop them from breaking the law again? If the answer is “no”, then it’s still immunity, plain and simple.

Now, there’s been a lot of talk about this impending deal on immunity, brokered between House Majority Leader Hoyer, the White House, and key Republicans. There’s been a lot of talk that the Republicans have given ground on immunity, and have made meaningful concessions. The negotiators have been quite successful at having their spin repeated in the press—that the federal courts will be allowed to decide whether phone companies “should” get immunity, or whether they are “entitled” to immunity, or, my favorite, whether they “deserve” immunity. These talking points foster the impression that there will actually be meaningful court review of what the phone companies did and whether it was legal; they foster the false impression that there will still be accountability.

I’m here to cut through the spin and say that based on a review of Senator Bond’s earlier draft proposal from several weeks ago, based on reports from Congressional staff close to the negotiations, and based on the more detailed news reports, the plain fact is that this supposed compromise is still immunity, same as it ever was, and anyone who opposed the immunity passed by the Senate in February should oppose this one too. Because in the end, it’s just the same, except for a few sham concessions meant to fool immunity opponents.

I think Senators Dodd and Feingold summed up the deal best, in their letter to Congressional leaders last week: as they pointed out, under this so-called compromise, “the court’s role would be limited to evaluating precisely the same question laid out in the Senate bill: whether a company received a written request or directive from the Attorney General or the head of an element of the intelligence community...indicating that the activity was authorized by the President and determined to be lawful.” If the Attorney General certifies that fact to the court, it must dismiss the cases, and the courthouse door will be closed to millions of Americans seeking to vindicate their privacy rights.

Of course, we already know from the Senate Intelligence Committee’s report on its bill that just such written requests—stating that the surveillance was authorized by the President and had been determined to be lawful—were provided to the companies. In other words, the only question the court has the power to review is a question that we already know the answer to.

Therefore, it doesn’t matter whether the the court reviews the the Attorney General’s certification for “abuse of discretion,” as in the Senate bill; or requires that it be supported by a “preponderance of the evidence,” as in the Bond proposal; or by “substantial evidence”, as the latest reports describe the current compromise language. The standard could be “beyond a reasonable doubt” and the result would be the same: immunity. Or, as Senators Dodd and Feingold put it: “Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs’ lawyers are permitted to play, the court would be required to grant immunity. To agree to such a proposal,” they conclude and we agree, “would not represent a reasonable compromise.” They’re right—it’s not a compromise, it’s pure theater.

The big question now is, why is Congress doing this? Well, it’s doing this because the president is placing the interests of the telcos ahead of the safety of the American people by refusing to sign a foreign intelligence surveillance bill that doesn’t contain immunity. Yet the issue of retroactive immunity is completely irrelevant to the question of whether and how the surveillance laws should be amended going forward. Now, the Administration has long claimed that failing to grant this retroactive immunity would endanger these companies’ cooperation with lawful surveillance in the future. But that claim has already been disproven: as the Administration itself admits, all of the companies have been complying with the surveillance directives issued under the Protect America Act. The only future cooperation threatened by holding the telcos accountable now is cooperation that violates the law. Because Immunity sends the message to the phone companies that it’s alright to ignore the law next time they get a slip of paper saying “the President thinks it’s OK”, even if—as in this case—the surveillance plainly violates multiple longstanding privacy statutes and the Constitution itself.

Congress should not reward these lawbreakers, or help the White House cover-up and avoid a ruling that its surveillance program broke the law. Instead, we call on Democratic leaders—especially House Speaker Pelosi and Senator Obama—to call the President’s bluff. There’s simply no need to give this lame duck White House a going away present in the form of immunity, if the issue is national security. Rather, any purported intelligence gap that may arise as some Protect America Act orders begin to expire in August could easily be corrected simply by passing a bill to extend those orders. To be clear, we opposed the PAA, and we’d prefer to see those orders expire, but if it’s a choice between extending those orders, or unnecessarily passing a dangerous and radical rewrite of the surveillance laws and giving the phone companies a get-out-of-jail-free card, the choice is obvious. And if congressional Republicans oppose that extension, or the president vetoes it, then the voting public will know which party cares most about the rights and the safety of ordinary Americans.

Which raises one last question that I leave to you, the press: why did the Administration fail to renew the existing Protect America Act orders or issue new ones in February, before the PAA expired? This supposed intelligence crisis that will reach a head in August wouldn't be an issue at all, if the Attorney General had just issued new orders. Did the Administration simply forget to do so, which would be the height of negligence? Did it decide that the orders that would expire in August were no longer necessary to protect the American people, in which case there is no crisis? Or did it simply decide that creating an artificial intelligence gap was worth the danger to the American people, so long as it could be used to force the passage of immunity for its telco friends? In the days to come, I hope that you will demand an answer to that question.

In the meantime, I just wanted to let you know before I wrap up that one of the ordinary Americans represented in our lawsuit—Tash Hepting, the Hepting in *Hepting v. AT&T*—is available and eager to talk to the press about his motivations for bringing suit, and his objections to immunity. Despite the Republican talking points, he's no trial lawyer looking to line his pockets—nor am I, for that matter, I'm a salaried non-profit worker—but he is an average citizen, representing millions more, who is demanding that the rule of law be upheld and that those who violated his rights be held accountable. So, please contact our media coordinator Rebecca Jeschke if you'd like to speak with him.

Thanks, and I look forward to your questions.