

THE PRE-EMPTIVE CAVE ON IMMUNITY

Glenn Greenwald catches the Democrats preparing to cave to Administration demands for retroactive immunity for the telecoms.

Mr. McConnell argued on Tuesday that the expanded surveillance powers granted under the temporary measure should be made permanent.

He also pushed for a provision that would grant legal immunity to the telecommunications companies that secretly cooperated with the N.S.A. on the warrantless program. Those companies, now facing lawsuits, have never been officially identified.

Democratic Congressional aides say they believe that a deal is likely to provide protection for the companies. [my emphasis]

But Glenn is just now catching onto something that bmaz has been harping on for some time. So long as the Attorney General approved the program, the telecoms would have indemnity.

With regard to FISA immunity, JAO in comments makes the important point that FISA, from its inception, already provided that telecoms would be immune from liability if the Attorney General certified that the law did not require a warrant for the surveillance that they allowed. Presumably, that means that with regard to what they did over the last six years, they had no such certification for at least some of Bush's warrantless activities which they enabled.

They may have lacked this certification because Ashcroft refused to provide it,

and/or because Ashcroft was kept in the dark about some of what they were doing, and/or because they are concerned about the period of time when (as we now know, as a result of James Comey's testimony) the DOJ refused to certify the legality of the surveillance activities (and threatened to resign en masse if it continued), and Bush ordered it to continue anyway. If we lived in a society with either an open government or a Congress that understood its oversight responsibilities, we would know why the telecoms lacked this certificate and thus are in need of retroactive liability. Since we don't, we're left to guess.

I think Glenn's speculation—that there is no AG authorization—is, for the most part, incorrect. Here's bmaz (and see also this comment):

I still maintain that as long as there is a warrant valid on its face or a properly certified AG letter that appears valid on its face, the telcos either have no liability or, alternatively, are entitled to indemnification by the government for any resultant liability and any costs and expenses incurred by the telcos in defending themselves. There is massive liability here, but I just don't believe the telcos ultimately bear that liability. The attempts at immunity are all about shielding the Bush Administration. Telco immunity is just another shell game fraud being sold like snake oil to the public so that BushCo continues to avoid accountability.

Rather, bmaz is persuasive that there is not direct liability on part of the telecoms (except as it relates to the spying that occurred in the 24 hours when Bush authorized it without DOJ, and therefore AG, approval). But there is a

great deal of liability on the part of the government. If the AT&T lawsuit goes forward and a court finds AT&T did improperly share customer call data with the government, then Uncle Sam will end up picking up the tab, not the telecoms.