

# HEY SENATORS! WHAT ABOUT IMMUNITY FOR FORMER QWEST OFFICIALS

As I pointed out in this post, the Senate Intelligence Committee used a remarkable argument to justify giving the telecoms immunity in their FISA bill. Basically, it argued the telecoms could neither prove or disprove whether they were entitled to immunity according to existing statutes, because the mean old Bush Administration had invoked State Secrets. And therefore, the invocation of State Secrets put them in an unfair position as they tried to defend themselves against lawsuits.

To the extent that any existing immunity provisions are applicable, however, providers have not been able to benefit from the provisions in the civil cases that are currently pending. Because the Government has claimed the state secrets privilege over the question of whether any particular provider furnished assistance to the Government, an electronic communication service provider who cooperated with the Government pursuant to a valid court order or certification cannot prove it is entitled to immunity under section 2511(2)(a)(ii) without disclosing the information deemed privileged by the Executive branch.

[snip]

Providers who did not assist the Government are similarly unable to extract themselves from ongoing litigation, because the assertion of the state secrets privilege makes it impossible for them to demonstrate their lack of involvement.

So the logic, in general, is that it is unfair for a defendant in a civil suit to be prevented from defending itself because the government has invoked State Secrets and thereby prevented the defendant from introducing the evidence that would prove its innocence or its immunity.

Of course, the Senate Intelligence Committee is only making that argument in the context of its desire to convince telecoms to cooperate with the government, regardless of the laws that are supposed to guide that cooperation. I'd bet you that, if a defendant were unable to defend itself from lawsuits because the government invoked State Secrets, and if that defendant had **not** cooperated with the government in illegal wiretapping, no one would bat an eye at the injustice.

Well, we're going to get to see just that in the civil suit against Joseph Nacchio and other former Qwest officials. Because there, the government is invoking State Secrets in a case against individuals who refused to cooperate because—at least Nacchio claims—they believed cooperation would have been against the law.