

# THE HOSPITAL CONFRONTATION HEROES OF RULE OF LAW GUTTED SEPARATION OF POWERS

Remember that cinematic story of how Jim Comey and Jack Goldsmith and Robert Mueller stood up to Bush and Cheney and forced them to shut down their illegal dragnet to defend the rule of law in 2004?

It turns out, what Comey and Goldsmith did in secret two months later was not so heroic. As I lay out over at Salon, the memo of law they used to get their illegal dragnet blessed by the FISA court argued both Judge Colleen Kollar-Kotelly and the Congress that passed the PRTT law in the first place had no choice but to cede to Executive power.

Essentially, they argued both she – an Article III judge – and Congress must have their power gutted to protect the president’s power.

[snip]

The same heroes of the hospital confrontation, lionized for the last decade for their courageous defense of the rule of law, thereby gutted the separation of powers, in secret. All to serve still more secrecy ... and the power of the presidency they purportedly reined in two months earlier.

They may have won Bush – and themselves, who otherwise would have signed off on an illegal program – legal cover by doing so. But in the process they corroded the balance of powers

enshrined by the Constitution, turning the FISC into a place where expansive executive branch programs get rubber-stamped in secret.

Here's how they justified not getting Congress to write a new law to authorize the spying they themselves refused to approve.

The memo's focus on Congress – at least what appears in unredacted form – is much more circumspect, but perhaps even more disturbing.

DOJ pointed to language showing Congress intended pen registers to apply to the Internet; they pointed to the absence of language prohibiting a pen register from being used to collect data from more than a single user, as if that's the same as collecting from masses of people and as if that proved congressional intent to wiretap everyone.

And then they dismissed any potential constitutional conflict involved in such broad rereadings of statutes passed by Congress. "In almost all cases of potential constitutional conflict, if a statute is construed to restrict the executive, the executive has the option of seeking additional clarifying legislation from Congress," the heroes of the hospital confrontation admitted. The White House had, in fact, consulted Majority Leader Tom DeLay about doing just that, but he warned it would be too difficult to get new legislation. So two months later, DOJ argued Congress' prerogative as an independent branch of government would just have to give way to secrecy. "In this case, by contrast, the Government cannot pursue that route because seeking legislation would inevitably compromise the secrecy of the collection program the Government wishes

to undertake.”

You remember that part of the Constitution where it says Congress passes the laws, unless the Executive Branch wants the laws to be secret, in which case they can do it?

Nope, neither do I.