

# THEY CAN'T LEGISLATE \$HIT

Marty Lederman notes that Cheney's latest dodge includes a reference to the ruling that limits Congress' oversight over the Executive strictly to those areas where it pertains to legislation. From that, he argues that Cheney's response was premised on the belief that FISA itself is an illegal restriction on the Executive.

Finally, the letter lists numerous reasons why the VP's office might not release the requested documents. The second of those reasons is this:

The Office of the Vice President reserves the limitations on congressional inquiries set forth in *Barenblatt v. United States*, 360 U.S. 109 (1959), which makes clear that the power to inquire extends no further than the power to legislate.

Now, I happen to think that this so-called "limitation" on congressional inquiries is not nearly so clear: Many of the earliest legislative investigations were not for the purpose of designing statutory amendments, but were instead "only" to investigate wrongdoing or malfeasance in the Executive branch; and the better view is probably that Congress has at least some such broad investigative power, unrelated to its lawmaking functions. (The Court has even indicated that Congress has an important interest in Executive branch transparency simply in order to facilitate "the American people's ability to reconstruct and come to terms with their history." *Nixon v. Administrator*, 433 U.S. at 452-453.)

But even if it were the case that Congress can only investigate in areas where it can legislate, . . . so what? Such an objection would only be meaningful in the context of this subpoena if there were some question about Congress's power to legislate with respect to the relevant Executive branch conduct.Â

So think about what the VP's letter is suggesting – that perhaps Congress can't legislate on the topic of the government's domestic electronics surveillance!

This is, I think, a fairly audacious assertion to be making at this late date. After all, just a few days ago the President himself insisted that Congress legislate forthwith on this very subject, and then showered praise on Congress for enacting the "Protect America Act," without suggesting any constitutional disability.

What the letter is getting at here, of course, is the Vice President's long-standing view that FISA is unconstitutional, and that Congress simply can't regulate the Commander in Chief's collection of intelligence. In other words, Who Needs the Protect America Act?: Nothing would or could stop us from warrantless surveillance, anyway.

Lederman may be correct in this particular instance. But his conclusion does not necessarily follow from the available evidence. As I have repeatedly shown, the Administration has made precisely the same argument when Congress subpoenaed testimony relating to the USA purge. And as with the warrantless wiretapping program, the claim that Congress had no legislative interest in the matter at hand came after the Administration had very happily

accepted the legislation Congress had passed on precisely that matter (in the case of USA Purge, the legislation was the provision of the PATRIOT Act that gave the Attorney General the power to appoint interim USAs).

But unlike the FISA case Lederman examines, there can be no dispute—not even from the Unitary nuts—that Congress has the authority to legislate on interim USAs. The authority is inscribed in the Constitution. Nevertheless, the Administration wanted to contest Congress' legislative interest in it anyway.

So while Lederman may be right, I don't think he is. I think the Administration is making a grander argument, one that makes an expansive claim that Congress cannot legislate away any authority enjoyed by the Executive, even one limited by the Constitution.