

# IMMUNITY MAY BE DEAD ANYWAY

As you've no doubt heard, yesterday Pat Leahy pulled some superb parliamentary maneuvers to ensure that the SJC version of the FISA amendment came out of committee without immunity for telecoms. He basically just severed the part which permits the wiretapping from the part that gives immunity. Voila!

Unfortunately, it still seems likely that Harry Reid will let the SSCI bill—the one we don't like—come to the floor of the Senate. Pat Leahy pulled some nice maneuvers, but Reid has a few more aces in his hand. And in any case, it may be utterly moot.

When Arlen "Scottish Haggis" Specter has discussed his "compromise" on immunity in the FISA amendment, he has said he thought the cases in CA would be thrown out on State Secrets grounds anyway; his compromise (in true haggis fashion) is really designed to save the telecoms money while they're waiting for the courts to throw out the cases.

Turns out they might not have to wait that long—and immunity may be moot anyway. That's because the 9th Circuit, in a unanimous decision, threw most of the most Kafkaesque illegal wiretap case out.

A federal appeals court dealt a near-fatal blow Friday to an Islamiccharity's lawsuit alleging federal investigators illegally wiretapped it, saying a key piece of evidence the charity planned to use is aprotected state secret.

A top secret call log that the Treasury Department accidentally turned over to the now-defunct U.S. arm of the Al-Haramain IslamicFoundation's lawyers can't be used as evidence, the 9th U.S. CircuitCourt of Appeals ruled.

[snip]

The charity's lawyers voluntarily turned over the document to FBI agents after it was given to them. A lower court ruled that the lawyers couldn't use the actual document to support their lawsuit but could use their memories of its contents to go forward.

[snip]

"Such an approach countenances a back door around the privilege and would eviscerate the state secret itself," Judge M. Margaret McKeown wrote for the unanimous three-judge panel.

So basically, these guys have proof they were spied on, they've seen it, but the government is requiring that they legally wash their minds of any memory of that proof, so as to preserve State Secrets.

The Appeals Court decision on the Hepting case is pending—it relies on some other kinds of evidence—but it's a really amazing concept, this State Secret thing. The government, of its own accord, gave out the secret. But it expects individuals to be bound by it. Further, it expects defendants to forgo attorney-client privilege, apparently, because there's going to be no way of proving the government deliberately violated privilege.

Swell.

Time to think of some novel ways to force the government to stop spying illegally. And it's probably time to write some restrictions on spying on attorney-client privilege, too. Because the available options don't appear like they're going to work.