DON’T CRY FOR THE TELCOS – BUSH & CHENEY ARE THE ONLY ONES THAT ARE DYING FOR IMMUNITY

The issues surrounding the FISA legislation are still roiling in Congress, thanks to the sudden appearance of a spine and principle by the Democrats in the House of Representatives (and correspondingly, with no thanks to the spineless and craven counterparts in the Senate, especially Jello Jay Rockefeller, the SSCI, and Harry Reid for bringing the horrid Intel committee bill to the floor instead of the far superior Judiciary bill). The most contentious issue has been, and continues to be, the proposed retroactive immunity for telco companies. Since the ugly head of the issue was first raised last summer with the railroaded passage of the Protect America Act, I have been arguing vehemently that the telcos are not in any grave danger financially from the civil suits currently pending. If their conduct is as has been described to date, they are already protected from liability for the actions that have been described, both by existing statutory immunity and by a right to indemnification from the government. The full court press for immunity by the Administration is entirely about cover for the lawless Bush Administration, and not about the impending financial demise of the telcos.

This post will go back over some of the basis for my argument that has been laid out previously, both here at Emptywheel and, earlier, at The Next Hurrah. I will also try to relate a few basics on what the general concept of indemnification is, and how it relates to contracts, in this case the agreements between the telcos and the Bush Administration. I have been making this argument for quite some time

now, since last August, and have yet to have anybody put a significant dent in it; but it is no good if it cannot hold up to scrutiny. In that regard, I have posited my theory to several other lawyers expert in the field of governmental/Fourth Amendment litigation, including some extremely knowledgeable on the very civil suits at issue here, and all have agreed with the validity of my premise.

The Argument: The Bush Administration, with the help of telco providers (telelphone, cellphone, internet and other communication providers) engaged in massive wiretapping and datamining efforts, ostensibly to protect the United States from attack by terrorists. The legality of much of these programs has been questioned in many fora, but the germane ones for the immunity demand by the Administration are the civil suits that have been filed against both the telcos and the government that are currently pending in Federal courts. There are a handful of different suits out there (40 is a number that has been used, but some have been consolidated); the best known are the Hepting v. AT&T case being prosecuted by the EFF and the al-Haramain case. Under both traditional tort theories, as well as specific statutory provisions under FISA and related statutes, monetary damages are sought by the plaintiffs. These suits are not just critical for the individual plaintiffs, but due to the refusal of the Bush Administration to be honest and forthright about what spying they are doing on the American public, and the refusal of Congress to demand answers and accountability on the same, the civil suits are pretty much the only vehicle that the American public, and posterity, have for finding the truth about what has been both done to them and in their name. The Administration now, of course, wants to close off this avenue of discovery and accountability for their nefarious actions through the immunization of the telcos for their acts (which would result in dismissal of the civil suits).

First off, lets be honest; you don’t need

immunity for legal and proper conduct. In this regard, telcos are already specifically protected and "immunized" from liability for anything they did that was even remotely legal and performed under the broad provisions of FISA (50 USC 1801 et. seq.), the general criminal wiretapping statutes (18 USC 2510 et. seq., specifically 18 USC 2520), the Communications Act (47 USC et. seq., specifically 47 USC 605) and the Stored Communications Act (18 USC 2701 et. seq., specifically 18 USC 2707 and 2712). There is already, by existing law, no liability for any conduct undertaken, by either the telcos or the government, in compliance with these statutes. So, make no mistake about it, it is blatantly *illegal* behavior (and NOT good faith legal behavior), performed at the Bush Administration's *demand and direction*, for which the immunity is being sought.

Okay, but many, including, seemingly, members of the SSCI and witnesses (see here and here) argue that the telcos were not operating under statutory "safe harbor" provisions as described in the last paragraph. So, what if the telcos engaged in behavior outside of said "safe harbor" statutory provisions that turned out to be illegal behavior, but did so in response to to heated demands from the Bush Administration, and with assurances by the Administration that there was a legal basis and dire necessity; shouldn't they be entitled to immunity from massive civil liability damages for that conduct? No; that is where the indemnification portion of the argument kicks in. Indemnification is the act of supplying indemnity in a contract:

> An indemnity contract arises when one individual takes on the obligation to pay for any loss or damage that has been or might be incurred by another individual. The right to indemnity and the duty to indemnify ordinarily stem from a contractual agreement, which generally protects against liability, loss, or damage.

It is my contention that the telcos have just such indemnification agreements with the Administration/government, that we do not know about because they are classified and hidden, that so protect them for any liability and losses resulting from the litigation they are faced with; thus they do not need immunity to protect them from potential liability verdicts, they are already covered. Telcos have some of the best attorneys and legal departments in the world, and they also recruit heavily from the upper echelons of the Department of Justice (see, for instance: William Barr and Peter Keisler, who is now, of course, conveniently back in the DOJ leadership). Simply put, telco legal departments are huge, experienced, and cutthroat competent. They did not fall off the turnip truck last night, nor any other night; and they have been dealing with wiretapping issues for law enforcement and national security concerns since the telephone came into use. As someone that has had dealings with such entities regarding bad/illegal wiretaps, I can attest that they *always* protect themselves vis a vis the governmental entity they are working for and are not shy about the use of indemnity provisions.

Okay, but is there any basis for the Administration having given such an indemnification agreement to the telcos in such an unusual national security scenario and with such massive potential exposure? Yes, indeed that is exactly where such agreements are contemplated (see, also, here). As a perusal of the links will exhibit, the President has the authority under 50 USC 1431 et seq. to authorize exactly the type of immunity agreements that are described herein, and, furthermore, to promulgate specific rules (including secrecy and classification, see 50 USC 1433) for their implementation. Now, it should be noted that one of the provisions of 50 USC 1431 is notification of Congress, specifically the respective Armed Services Committees, if the amount in question exceeds 25 million dollars. It will be interesting to see if this was, in fact, done or

if the Administration disingenuously took the position that there was not yet an amount in controversy because there was not yet any known or set amount of indemnified liability (which is my bet under both a reading of 1431 and 1432(f)) and has kept this under their belt with the exception of limited disclosure to the Gang of Four/Gang of Eight as discussed here. In either case, this is potentially an explanation for why even the Democratic Congressional leadership has been compliant in ramming through passage of immunity; they don't want the public to find out that they signed off on massive liability to be paid out of taxpayer's pockets.

What if the telcos failed to get such indemnification agreements, or alternatively, they did but the agreements were informal or the government refused to honor them? For the reasons stated above, this is next to impossible to believe; the telcos and their legal departments are simply too tough, experienced and savvy to not have covered themselves. In the unlikely event this did turn out to be the case, however, the telcos still have the right to file a claim against the government for their losses incurred as a result of good faith reliance on the Administration's assertions and demands. Such a claim would most likely be brought pursuant to the Tucker Act as it would arise pursuant to contract or quasi-contract; although a creative litigator could surely plead other conceivable bases as well.

Conclusion: For the foregoing reasons, the telcos are already protected by the immunity of existing statutory safe harbor provisions for legal conduct requested by the Administration and will have indemnity for other acts demanded by the Administration. I respectfully submit that the telcos are already sufficiently protected from the Spectre (some pun intended) of massive financial peril of the existing civil lawsuits; and that the only real reason for the desperate push for immunity is panic among Administration officials that their craven illegality will be exposed and they will be held

to account. We now know for a fact, that which we have always suspected, thanks to Mike McConnell, namely that the entire belligerent push for FISA reform is all about immunity, and not about what George Bush would call "protectun Amarikuh".

The minor issues with FISA that need tweaking could have been easily accomplished and, indeed, Congress offered long ago to work with them to do just that; but, of course, were belligerently spurned because, as Dick Cheney famously bellowed, "We believe… that we have all the legal authority we need". This furious push has been about immunity, from the start, to prevent discovery of the Administration's blatant and unconscionable criminal activity. The House of Representatives, and the cave-in Administration cover-up specialists in the Senate as well, should take a long, hard look at what is really going on here and steadfastly refuse the Administration's self serving craven grab for the cover of telco immunity.

One last point. In addition to the foregoing, there is an extremely good case to be made that the granting of retroactive immunity to the telcos would comprise an improper and unjust taking of the existing plaintiffs' right to compensation under the Fifth Amendment and would, therefore, be in direct violation of the Constitution. I don't want to belabor this thought; just put it out there so that it is considered in the mix. Hey, "Teh Google" is a most marvelous thing; here is an absolutely outstanding discussion of this issue by Professor Anthony J. Sebok of the Cardozo School of Law.