

MY VERSION OF PELOSI'S STATEMENT ON EXCLUSIVITY

TPMM wrote up a summary of a response Speaker Pelosi gave to a question I asked at a blogger conference call today that has caused a stir. While I don't disagree with McJoan's take—if the Speaker *had* really said immunity was *the issue*, it would reflect a short-sighted view of FISA (though I'd say the same about other topics, such as segregation; after all, once the government can legally use information that has been improperly collected, that's toothpaste out of a tube, too)—I'd like to give my version of the conversation, because I don't think that's what Pelosi said or meant.

The call was originally supposed to be focused on contempt. So after the Speaker finished telling about the Paul Wellstone Mental Health and Addiction Equity bill, someone (Mike Stark, I think) asked for reassurances that the Democrats would continue to pursue contempt after we win the White House and larger margins in both houses next year. Pelosi spoke at length about how important this contempt fight is because of the separation of powers issue—and stated that this is a better case than when GAO tried to get Cheney's records on his Energy Task Force. Finally, in response to a follow-up, Pelosi stated that Democrats would continue to pursue the contempt issue after November.

Then, I piped in. I basically asked the idea laid out in this post.

Email providers argue that immunity will contribute to uncertainty. They speak of receiving "vague promises," they demand "clear rules" and "bright lines."

Given that complaints about uncertainty and unclear demands have led these email providers to strongly oppose retroactive immunity, it suggests the requests the

email providers got were really murky—murky enough that the requests caused the email providers a good deal of trouble.

If the government was making such murky requests, don't you think Congress ought to know what those requests were in more detail?

That is, since email providers just made a very strong statement against immunity, shouldn't we be asking them **why** they're opposed to it?

Pelosi, having just spoken at length about about separation of powers, then said that immunity wasn't the only issue, exclusivity was important as well.

Note, I'm not sure I can dispute Paul Kiel's description, though I don't remember Pelosi emphasizing exclusivity in the way his post suggests at all. I certainly didn't hear her say immunity is *the issue*, but then I was listening for my answer. (I thought about noting that I have been writing about more than immunity, but decided there were better things to do with the Speaker's time. She can just go ask Russ Feingold.)

I did, however, restate my question, asking why they don't bring in Google and Microsoft to find out why the people who got these requests from the government are actually opposed to immunity. She said it sounded like a good idea. (Woo hoo!)

The point is, in my opinion it is utterly wrong to paint what Pelosi said as a strategic statement *against* immunity and *for* exclusivity. She said nothing about trading immunity for exclusivity. I took her answer, following so closely on a fairly involved statement about the importance of fights over separation of powers, to simply point back that earlier discussion about contempt.

I think Speaker Pelosi was responding with a focus on ways to make sure Article I regains its

power from Article II, not about the nitty
gritty of the FISA fight.