

“OR HIS DESIGNEE”

I noticed something really funny in the AT&T response to Dingell and friends that MadDog linked to. In a passage describing why the telecoms should be granted immunity for abetting the Administration in its illegal wiretap program, AT&T cites 18 USC 2411(2)(a)(ii) to argue that it is immune from prosecution.

The same principle—that a telecommunications carrier who cooperates in good faith with the authorized law enforcement or intelligence activities considered lawful by the executive—underlies numerous defenses and immunities reflected in existing statutory and case law. For example, 18 U.S.C. 2511(2)(a)(ii) provides that **"notwithstanding any other law,"** carriers are authorized to provide "assistance" and "information" to the government whenever the communications service provider receives a "certification" from the Attorney General or his designee "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required. When the Attorney General furnishes an appropriate certification, Congress has decreed that **"no cause of action shall lie in any court."** It does not matter whether the Attorney General's judgment reflected in the certification is ultimately determined to have been right or wrong: as long as the carrier acted pursuant to such a certification, national policy forbids a lawsuit. [emphasis AT&T's]

Now compare their citation of 18 U.S.C. 2511(2)(a)(ii) with the actual statute.

(ii) Notwithstanding any other law,

providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

Do you see the difference? AT&T has unilaterally rewritten "a person specified in section 2518(7) of this title or the Attorney General" to say "Attorney General or his designee." (And if you're wondering, 2518(7) doesn't say anything about "designees" either. **Update:** yes it does—though it specifies that they have to be investigative officers.)

Of course, we know why AT&T has unilaterally rewritten the law. That's because, as SSCI kindly told us, AT&T conducted its illegal wiretap program based on the authorization of Alberto Gonzales, then White House Counsel.

The Committee can say, however, that

beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence activities that had been authorized by the President.

The Committee has reviewed all of the relevant correspondence. The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. **All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.** [my emphasis]

Of course, AT&T is not alone in rewriting the law to make it legal for the President's lawyer to authorize illegal wiretapping on American citizens. The SSCI did so themselves.

Under the existing statutory scheme, wire or electronic communication providers are authorized to provide information and assistance to persons with authority to conduct electronic surveillance if the providers have been provided with (1) a court order directing the assistance, or (2) a certification in writing signed by the Attorney General **or certain other officers** that —no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.|| See 18 U.S.C. § 2511(2)(a)(ii). [my emphasis]

"Certain other officers" ... "or his designee."
Neither of those phrases appear in the law, of course.

AT&T and SSCI have all but admitted that AT&T broke the law, engaging in wiretapping Americans based on the certification of Bush's lawyer.

And now Congress wants to retroactively make such wiretapping legal.