

THE BLOB THAT PASSED TELECOM IMMUNITY

Update: Well, this is unexpected. The 9th said no to the government request for a stay, pending hearing what the District Court has to say about the emergency appeal. Now it's back in the District Court for one more attempt at a stay.

About a million of you have linked this Wired story, with the headline:

Telephone Company is Arm of Government,
Feds Admit in Spy Suit

There's actually stuff in the government's motion for an emergency stay that I find much more interesting. For example, the language attempting to protect agency discussions with Congress describe Congress as a mere appendage to the executive branch which did not, in 2008, have its own distinct Constitutional interest in legislation concerning matters in which the executive branch had been found to have flouted duly passed laws.

In this case, the communications between the agencies and Congress were part of a collaborative effort to formulate revisions to FISA that would be acceptable both to the President and to Congress, and the communications themselves were relied on to develop the Executive Branch's positions regarding the appropriate scope and content of the proposed legislation. Given the purpose and role of the communications in the agencies' own deliberations, the agencies have regarded their communications with Congress as intra-agency documents under the foregoing lines of authority.

[snip]

In Klamath, the Court declined to treat

communications between a federal agency and Indian tribes regarding water rights as intra-agency because, unlike outside consultants, the tribes had independent financial interests in the subject matter of the communications, and those interests were adverse to other claimants. See 532 U.S. at 11-15. But the collaborative relationship between Congress and the Executive Branch in the development of new legislation has no resemblance to the relationship between the agency and the tribes in Klamath. In providing the agencies with information and views about legislative options for use in the development of the Executive Branch's own legislative position, Congress was participating in a common effort with the Executive Branch to advance the public interest. [my emphasis]

While I realize that may, in fact, be an accurate description of how Congress acted during this debate—the intelligence committees, in particular, served and continue to serve as branches of the intelligence agencies they purportedly oversee—it is a fascinating comment on the state of separation of powers that Congress would be described by the executive branch as a mere appendage to the executive branch.

As to the telecoms, the real argument the government is making here is that the Court did not account for the invocation of Exemption 3 (sources and methods) in its ruling. That is, they're saying that irrespective of whether or not the Court finds their argument that the telecoms are basically an agency of the government valid, the Court should still protect the names of the telecoms lobbying the agencies because revealing them would also reveal which telecoms were parties to the government's illegal wiretap program.

But I am rather interested in their claims about

the telecoms being an agency for another reason.

These were telecoms lobbying! Lobbying about programs that brought them and will continue to bring them ongoing business. But by treating the telecoms as agencies for this negotiation, the Obama Administration—the same Administration that required contractors hoping to get stimulus funds to write up and post their lobbying requests with regards to that program—is treating this lobbying as part of the task that telecoms have been contracted to do by the government. We are paying telecom contractors—the Administration maintains—to lobby our government and elected representatives (who are, at this point, just an appendage to the executive branch anyway) to make sure they continue to get that contracted work.

Of course, it's all the more perverse considering that the government is arguing we can't have the emails we paid telecom contractors to write to make sure we'll continue paying them to read all of our emails.

Like I said, none of this is an inaccurate statement of how the distance between contracting and lobbying collapses, and how the distance between supposedly separate branches of government collapses, in the era of the intelligence industrial complex.

But it doesn't mean it's legally justifiable.