

JUDGE WHITE THUMPS THE DOJ ON EFF FOIA CASE

Well, you just don't see this every day. As MadDog noted in comments last night, Judge Jeffrey S. White has entered a new order in NDCA denying the government's request for a stay pending appeal in the telco documents FOIA case brought by the EFF. And he did it before the government ever even really asked for a stay!

This is the case Marcy discussed in *The Blob That Passed Telecom Immunity* after the internets went code red over an article in Wired that the Feds supposedly admitted telcos were an appendage of the government. To recap, the EFF filed a FOIA case against the ODNI seeking government documents evidencing telecom lobbying on immunity for corporate participation in Bush's surveillance program. On September 24, 2009, Judge White found in favor of plaintiff EFF and ordered the records disclosed on or before October 9. On September 30, the government asked White for a stay so they could contemplate an appeal; White refused their request.

The EFF describes what transpired next in their press release:

On October 8, the day before the documents were due, the DOJ and ODNI filed an emergency motion asking the Court of Appeals for a 30-day stay while the agencies continue to contemplate an appeal. Around noon on October 9, the Ninth Circuit denied their emergency motion, telling the government it had to file for a motion for a stay pending appeal in the district court first.

Later that afternoon, the government filed again in the federal district court, but once again did not seek a stay pending an actual appeal. Instead,

for the third time, the government insisted it could delay the release of telecom lobbying records while it considered the pros and cons of appealing. Briefing was complete by noon today, and Judge White denied the third attempt at delay this afternoon.

Get that? The government once again *did not* request a stay from Judge White. And he went ahead and ruled against them as if they had. See, I told you there was a reason they tried to bypass Judge White the first go around. I guess Vaughn Walker is not the only judge in NDCA that is fed up with the disingenuous pleading and concealment of unconstitutional activity the government relentlessly spews forth.

Judge White's five page Order has some really sweet passages:

There has been no material change in circumstances and the Court is still not persuaded that it should exercise its discretion to stay its directive that Defendants disclose the disputed documents pending a decision whether or not to appeal the Court's original Order. At this point, because a notice of appeal has been filed, a properly noticed motion for a stay pending appeal would have been appropriately filed before this Court. See Fed. R. Civ. P. 62(c). However, such a motion is not before the Court and Defendants have repeatedly reiterated that they have not filed such a motion. Regardless, the Court will address the substantive factors in ruling on such a motion in order to obviate the need for the parties to return once again to this Court before addressing the issue of a stay pending appeal.

White is tired of being jerked around by the disingenuous antics of Obama's DOJ and he

decided to move them along to the 9th; and why not, they are going there anyway, no reason to let them delay and obfuscate on the way.

Then White sets the table for dissection of the DOJ specimen:

The Court reviewed and explicitly rejected Defendants' contentions that any exemption under FOIA or privilege barred disclosure of the disputed documents and information. Having made no new argument, the Court does not find that Defendants have made a strong showing that they are likely to prevail on the merits of their appeal. Second, the Court finds that the public interest and the balance of hardships squarely favor timely production of the requested documents.

Nice. Then he lowers the boom. And, all things considered, it is simply a devastating blow:

Considering the delay in disclosure thus far in this matter, the current administration's pointed directive on transparency in government, and the public's renewed interest in the question of legal immunity for the telecommunications companies that participated in the warrantless wiretapping program while considering currently pending legislation repealing the amendments to FISA, the Court finds that the public interest lies in favor of disclosure. This Court has already found, when deciding the motion for preliminary injunction in this case, that "irreparable harm exists where Congress is considering legislation that would amend the FISA and the records may enable the public to participate meaningfully in the debate over such pending legislation." *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 542

F. Supp. 2d 1181, 1187 (N.D. Cal. 2008). The Court finds that same harm to the public interest exists in the context of the current debate regarding legislation designed to repeal the retroactive immunity for telecommunications companies. The unusual circumstances of the continued debate on the issue of legal immunity for the telecommunications companies that participated in the government's warrantless wiretapping program distinguish this case from the common FOIA matter. Although timely disclosure would negatively affect the Defendants' position on appeal, it is not clear that Defendants will even pursue the appeal already filed and, regardless, the Court finds the equities weigh in favor of denial of a stay.

Ouch. In the first sentence, he hammers the government for its delaying tactics, pricks Obama for his earlier, but now seemingly abandoned, claim to favor transparency, and upholds the public's right to know. Beautiful! And then, for good measure, he repeats the inherent interest the public has in the warrantless wiretapping issue as well as the attempt to immunize the telecoms.

Any bets on whether there is a copy of this decision sitting on Vaughn Walker's desk? We shall see what the 9th Circuit does once this is back in their lap, but Judge Jeffrey S. White has left no doubt whatsoever what he thinks. Oh, and by the way, Judge White set the next disclosure deadline for October 16, 2009 at 4:00 p.m. PST. That would be this Friday. I bet there is some serious scurrying around by the DOJ today and Thursday.