

# Retroactive Liability Protection Is Critical To Our National Security

*Congress Should Not Pass Any Amendments To Delay Or Eliminate Retroactive Liability Protection For Companies Believed To Have Assisted Our Government In The Aftermath Of 9/11*

As Congress returns from its Fourth of July recess, it should act quickly to pass the crucial long-term FISA modernization bill to keep our Nation safe. The strong bipartisan legislation passed in the House provides the Intelligence Community with the tools it needs to secure our Nation while protecting the liberties of Americans. This bill also provides the necessary legal protections for those companies sued in the aftermath of 9/11. Both Houses of Congress, by wide bipartisan margins, have made the judgment that retroactive liability protection is the appropriate and fair result. If Congress were to include any amendment that eliminates or delays liability protection for those that assisted the Government in the aftermath of 9/11, the President would veto this legislation.

## Three Senate Amendments Threaten The Important Liability Protection Provided In The Bipartisan House Bill

- 1. The Dodd/Feingold/Leahy amendment proposes to entirely eliminate retroactive liability protection from the bipartisan House intelligence legislation.** The Administration opposes any amendment to strike liability protection because any companies that may have assisted the Government after 9/11 were assured that their cooperation was legal and necessary. The liability protection in the bipartisan House legislation does not extend to the Government or Government officials, and it does not immunize any criminal conduct. The liability protection provision applies only in a narrow set of circumstances. An action must be dismissed if:
  - The electronic communications service provider did not provide the assistance; or
  - The assistance was provided in the wake of the 9/11 attacks and was the subject of a written request or series of requests from a senior Government official indicating that the activity was authorized by the President and determined to be lawful.
- 2. The Specter Amendment would continue to leave companies vulnerable to unwarranted and unfair lawsuits.** Congress should not allow companies to be subjected to billion-dollar claims because they are believed to have answered the Government's request for assistance and were assured of the legality of any actions.
  - This amendment would unnecessarily prolong and delay litigation, and the companies being sued would continue to be subjected to burdens of litigation such as attorneys' fees and disruption of their businesses. This could deter private sector cooperation with the intelligence community.
  - The amendment would also risk the disclosure of highly sensitive classified information concerning intelligence sources and methods. Extending this litigation could lead to the disclosure of highly sensitive national security information and would be contrary to the well-established state secrets privilege doctrine.
- 3. The Bingaman amendment would unnecessarily postpone a decision on whether to provide liability protection to telecommunications companies.** The amendment would prevent providers from receiving retroactive liability protection until 90 days after the Inspectors General of various departments complete and submit a review of prior activities.
  - Providing prompt liability protection is critical to our national security. These cases have already been pending for years, and delaying implementation of the liability protections means that the companies would remain subjected to the prospect of defending against multi-billion-dollar claims and continue to suffer from the uncertainty caused by pending litigation.

## Retroactive Liability Protection Is The Appropriate And Fair Result

**Liability protection is a fair and just result and is necessary to ensure the continued assistance of the private sector.** The Senate Intelligence Committee already conducted an extensive study of the issue and determined that providers had acted in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful. This Committee, chaired by Sen. Rockefeller (D-WV), carefully studied the issue and found that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation."

- **The assistance of private-sector telecommunications companies is vital to protecting our Nation from attack.** Most of the communications infrastructure the Intelligence Community relies on is owned and operated by the private sector, meaning private-sector assistance is essential to gaining intelligence on the plans of those who wish to attack us.
- **Without this protection, companies will be increasingly reluctant to provide vital cooperation because of their uncertainty about the law and fear of being sued by class-action trial lawyers.**