

Protect America Alert:

Liability Protection Is Essential To Our National Security

Legislation Modernizing The Foreign Intelligence Surveillance Act (FISA) Should Grant Retrospective Liability Protection To Companies

Believed To Have Assisted In Efforts To Defend America Following The 9/11 Attacks

As recognized by the Senate Intelligence Committee's bipartisan bill, companies alleged to have assisted the government in the aftermath of September 11th should not face massive and costly litigation for helping protect our country. The Senate Intelligence Committee carefully studied this issue and found that without responsible retroactive liability protection, "the private sector might be unwilling to cooperate with lawful government requests." The Committee rightly determined that this lack of protection could result in a "possible reduction in intelligence" that is "unacceptable for the safety of our Nation."

- Such litigation risks the disclosure of highly classified information and could lead to reduced intelligence collection capabilities in the future by discouraging companies from cooperating with the government.
- Companies should not be held responsible for verifying the government's determination that requested assistance was necessary and lawful – and such an impossible requirement would hurt our ability to keep the Nation safe. Requiring companies to second-guess the government's determinations would slow or eliminate critical intelligence collection and would place private parties in the impossible position of making legal determinations without access to the classified facts necessary to make such determinations.
- Failing to provide liability protection sends the wrong message to every private party that may in the future consider whether to help the Nation.

"Those In The Private Sector Who Stand By Us In Times Of National Security Emergencies Deserve Thanks, Not Lawsuits"

Director of National Intelligence Mike McConnell: "Lack of liability protection would make it much more difficult to obtain the future cooperation of the private-sector partners whose help is so vital to our success." "[W]ithout ... retroactive liability protection, [companies'] general counsels, as an obligation ... would tell them not to cooperate with us. ... The tragedy is it would slow our efforts; it would make us less effective." (Select Committee On Intelligence, U.S. Senate, Hearing, 2/5/08)

U.S. Attorney General Michael Mukasey: "Liability protection is ... critical to the ongoing effort to protect the nation from another catastrophic attack." (Michael Mukasey, Op-Ed, "We Balance Security, Privacy," *USA Today*, 12/20/07)

- "[I]n the future we will need the full-hearted help of private companies in our intelligence activities; we cannot expect such cooperation to be forthcoming if we do

not support companies that have helped us in the past." (Michael Mukasey, Op-Ed, "A FISA Fix," *Los Angeles Times*, 12/12/07)

FBI Director Robert Mueller: "My concern is that if we do not have this immunity, we will not have willing support of the communication carriers." (J. Taylor Rushing, "Senate Picks Up Work On Wiretapping Bill," *The Hill*, 2/6/08)

"If We Are Going To Protect American Lives, We Need The Nation's Best Telecommunications Experts On Our Side"

Senate Select Committee On Intelligence Chairman John D. Rockefeller (D-WV): "[W]e must preserve the cooperation of private industry for the next president, and for every one who follows." "The fact is, private industry must remain an essential partner in law enforcement and national security. We face an enemy that uses every tool and technology of 21st-century life, and we must do the same. If American business – airlines, banks, utilities and many others – were to decide that it would be too risky to comply with legally certified requests, or to insist on verifying every request in court, our intelligence collection could come to a screeching halt. The impact would be devastating to the intelligence community, the Justice Department and military officials who are hunting down our enemies." (John D. Rockefeller IV, Op-Ed, "Partners In The War On Terror," *The Washington Post*, 10/31/07)

9/11 Commission Co-Chair Lee H. Hamilton: "Unless Congress provides immunity, the clear message will be that private citizens should help only when they are certain that all the government's actions are legal. Given today's threats, that is too high a standard." (Lee H. Hamilton, Op-Ed, "Immunity For Wiretap Assistance Is Right Call," *The Baltimore Sun*, 11/4/07)

Former U.S. Attorneys General Benjamin Civiletti and Dick Thornburgh and Former CIA and FBI Director William Webster: "Dragging phone companies through protracted litigation would not only be unfair, but it would deter other companies and private citizens from responding in terrorist emergencies." "If we do not treat companies fairly when they respond to assurances from the highest levels of the government that their help is legal and essential for saving lives, then we will be radically reducing our society's capacity to defend itself." (Benjamin Civiletti, Dick Thornburgh, and William Webster, Op-Ed, "Surveillance Sanity," *The Wall Street Journal*, 10/31/07)

Former CIA Director R. James Woolsey: "Private Help For The Public Good Shouldn't Lead To Litigation." "We live in a world of terrorism, the possible proliferation of nuclear weapons and a host of other risks to our security. Intelligence, and the cooperation of the private sector in obtaining and protecting it, will be among our most important tools to avoid catastrophes such as Sept. 11 or worse." (R. James Woolsey, Op-Ed, "Private Help For The Public Good Shouldn't Lead To Litigation," *The San Jose Mercury News* [CA], 11/16/07)

Former Attorney General John Ashcroft: "To put the matter plainly, this puts American lives at risk." "Even more important than the inherent unfairness of requiring companies to second-guess executive-branch legal judgments are the acute dangers to which it would expose the country. ... The message that will be sent to American companies is that they can be exposed to crippling lawsuits for helping the government with national security activities that they are explicitly assured are legal. The only rational response would be for companies to adopt an attitude

of extreme wariness, even in the most urgent or clear-cut situations." (John Ashcroft, Op-Ed, "Uncle Sam On The Line," *The New York Times*, 11/5/07)

"A Denial Of Even Retrospective Immunity Would Certainly Lead To Less Such Cooperation In The Future"

National Review's Andrew McCarthy: "Granting the telecoms immunity... is not merely the only fair thing to do but the only smart thing to do." "Moreover, if we are going to protect American lives, we need the nation's best telecommunications experts on our side, helping the intelligence community maintain our technology edge over the jihadists. We can't expect that kind of cooperation if we turn the industry into a defendant, facing ruinous legal costs as a consequence of patriotically answering government's call for help after jihadists murdered nearly 3000 of us." (Andrew McCarthy, Op-Ed, "Let's Have A FISA Fight," *The National Review Online*, 1/14/08)

The Wall Street Journal: "By far the worst threat is an amendment from Senator Chris Dodd (D., Conn.) to deny legal immunity to telephone companies that cooperated with the government on these wiretaps after 9/11." "The companies face multiple lawsuits, so a denial of even retrospective immunity would certainly lead to less such cooperation in the future." (Editorial, "Wiretap Showdown," *The Wall Street Journal*, 2/11/08)

- **"Immunity for the telcos is not only fair but crucial."** "Protection from lawsuits also makes sense given the nature of the terrorist threat. There could well be another attack, or a future need for the private sector's help in preventing one. If a phone company or airline or bank is worried about Senator Dodd and the tort bar making its life miserable, it will be less likely to cooperate with the government. And the country will be less safe as a result." (Editorial, "Wiretap Politics," *The Wall Street Journal*, 1/11/08)

The Washington Post: "[T]he telecommunications providers seem to us to have been acting as patriotic corporate citizens in a difficult and uncharted environment." "There is one major area of disagreement between the administration and House Democrats where we think the administration has the better of the argument: the question of whether telecommunications companies that provided information to the government without court orders should be given retroactive immunity from being sued. House Democrats are understandably reluctant to grant that wholesale protection without understanding exactly what conduct they are shielding, and the administration has balked at providing such information. But the telecommunications providers seem to us to have been acting as patriotic corporate citizens in a difficult and uncharted environment." (Editorial, "Surveillance Update," *The Washington Post*, 10/14/07)

National Review: "Public safety increasingly relies on the cooperation of telecom providers. If ruinous lawsuits are the price of that cooperation, it will not be forthcoming." "FISA reform should also protect communications-service providers who assist the government, and it should apply this protection retroactively. The controversy over the NSA program is a political dispute about whether the president or Congress has ultimate authority over foreign-intelligence collection. It should not turn into a legal dispute in which privacy activists compel disclosure of classified information while seeking to impose civil or even criminal liability on those who have assisted the government's national-security efforts." (Editorial, "Fixing FISA," *National Review*, 10/15/07)