

July 7, 2008

The Honorable Harry Reid
Majority Leader
United States Senate
528 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Leader:

This letter presents the views of the Administration on an amendment to the Foreign Intelligence Surveillance Act of 1978 ("FISA") Amendments Act of 2008 (H.R. 6304) that was not covered in our letter of June 26, 2008. As we stated in that letter, we strongly support enactment of H.R. 6304, which would represent an historic modernization of FISA to reflect dramatic changes in communications technology over the last 30 years. This bill, which passed the House of Representatives by a wide margin of 293-129, is the result of a bipartisan effort that will place the Nation's foreign intelligence effort in this area on a firm, long-term foundation. The bill provides our intelligence professionals the tools they need to protect the country and protects companies whose assistance is vital to this effort from lawsuits for past and future cooperation with the Government.

As we have previously noted, any FISA modernization bill must contain effective legal protections for those companies sued because they are believed to have helped the Government prevent terrorist attacks in the aftermath of September 11, 2001. Liability protection is the fair and just result and is necessary to ensure the continued assistance of the private sector. H.R. 6304 contains such protection, but the amendment addressed in this letter would unnecessarily delay implementation of the protections with the purpose of deferring any decision on this issue for more than a year. This amendment would reportedly foreclose an electronic communication service provider from receiving retroactive liability protection until 90 days after the Inspectors General of various departments, as required by section 301 of H.R. 6304, complete a comprehensive review of, and submit a final report on, communications intelligence activities authorized by the President between September 11, 2001, and January 17, 2007. The final report is not due for a year after the enactment of the bill. Any amendment that would delay implementation of the liability protections in this manner is unacceptable. Providing prompt liability protection is critical to the national security. Accordingly, we, as well as the President's other senior advisors, will recommend that the President veto any bill that includes such an amendment.

Continuing to deny appropriate protection to private parties that cooperated in good faith with the Government in the aftermath of the attacks of September 11 has negative consequences for our national security. The Senate Intelligence Committee

recognized that “the intelligence community cannot obtain the intelligence it needs without assistance from these companies.” That committee also recognized that companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance, and that the “possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.” These cases have already been pending for years, and delaying implementation of appropriate liability protection as proposed by the amendment would mean that the companies would still face the prospect of defending against multi-billion-dollar claims and would continue to suffer from the uncertainty of pending litigation. Indeed, the apparent purpose of the amendment is to postpone a decision on whether to provide liability protection at all. Such a result would defeat the point of the carefully considered and bipartisan retroactive liability protections in H.R. 6304—to provide for the expeditious dismissal of the relevant cases in those circumstances in which the Attorney General makes, and the district court reviews, the necessary certifications—and could result in the very degradation in private cooperation that the bill was designed to prevent. The intelligence community, as well as law enforcement and homeland security agencies, continue to rely on the voluntary cooperation and assistance of private parties in other areas. Continued delay in protecting those who provided assistance after September 11 will invariably be noted by those who may someday be called upon again to help the Nation. Finally, by raising the prospect that the litigation at issue could eventually proceed, this amendment fails to address the risk that on-going litigation will result in the release of sensitive national security information, a risk that, if realized, could cause grave harm to the national security.

Deferring a final decision on retroactive liability protection for 15 months while the Inspectors General complete the review required by H.R. 6304 is also unnecessary. The Senate Intelligence Committee conducted an extensive study of the issue, which included the review of the relevant classified documents, numerous hearings, and testimony. After completing this comprehensive review, the Committee 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, and that the providers “had a good faith basis” for responding to the requests for assistance they received. Accordingly, the Committee agreed to the necessary legal protections on a 13-2 vote. Similarly, the Intelligence Committee of the House of Representatives has been extensively briefed and has exercised thorough oversight in regard to these intelligence matters. We also have made extraordinarily sensitive information available to the Judiciary Committees of both the Senate and House.

The Senate passed a prior version (S. 2248) of the current pending bill, which included retroactive liability protection, by a vote of 68-29. Both Houses of Congress, by wide bipartisan margins, have now made the judgment that retroactive liability protection is the appropriate and fair result. The Congress has been considering this issue for over two years and conducted extensive oversight in this area. During this period, we have emphasized the critical nature of private sector cooperation in protecting our national security and the difficulties of obtaining such cooperation while issues of liability protection remained unresolved. Further delay will damage our intelligence capabilities.

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Thank you for the opportunity to present our views on this crucial bill. We reiterate our sincere appreciation to the Congress for working with us on H.R. 6304, a long-term FISA modernization bill that will strengthen the Nation's intelligence capabilities while protecting the liberties of Americans. We strongly support its prompt passage.

Sincerely,



Michael B. Mukasey
Attorney General



J.M. McConnell
Director of National Intelligence

cc: The Honorable Mitch McConnell
Minority Leader
United States Senate