

October 29, 2007

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
The Honorable Arlen Specter  
Ranking Member, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Specter:

We are writing to support the carrier immunity provision passed with bipartisan support in the FISA reform legislation recently reported out by the Senate Select Committee on Intelligence (SSCI) and now before your Committee for consideration. We believe that the carrier immunity provision not only provides a just and fair protection for companies that allegedly responded to a call for assistance from the President in a time of national crisis, but also is a necessary policy for promoting the national security interests of the United States.

Telecommunications carriers who allegedly participated in what has become known publicly as the "Terrorist Surveillance Program" have been sued in over forty lawsuits seeking hundreds of billions of dollars in damages. Beyond the existence of an intelligence program involving electronic surveillance, which the President has confirmed, we cannot, of course, confirm anything further in this letter, including whether or not any telecommunications carriers even participated in such a program. The fact remains, however, that carriers are facing years of expensive litigation and potentially ruinous damages based upon allegations of their involvement in an intelligence program authorized by the President, reviewed for legality at the highest levels of the Executive Branch, and represented to the carriers to be lawful. We believe these lawsuits should not be allowed to proceed.

Protecting carriers who allegedly responded to the government's call for assistance in the wake of the devastating attacks of September 11, 2001 and during the continuing threat of further attacks is simply the right thing to do. When corporations are asked to assist the intelligence community based on a program authorized by the President himself and based on assurances that the program has been determined to be lawful at the highest levels of the Executive Branch, they should be able to rely on those representations and accept the determinations of the Government as to the legality of their actions. The common law has long recognized immunity for private citizens who respond to a call for assistance from a public officer in the course of his duty. The salutary purpose of such a rule is to recognize that private persons should be encouraged to offer assistance to a public officer in a crisis and should not be held accountable if it later turns out that the public officer made a mistake. That principle surely applies here, especially given the limited nature of the immunity contemplated in the bill, which would apply only where carriers were told that a program was authorized by the President and determined to be lawful.

Failing to provide immunity to the carriers will produce perverse incentives that risk damage to our national security. If carriers now named in lawsuits are not protected for any

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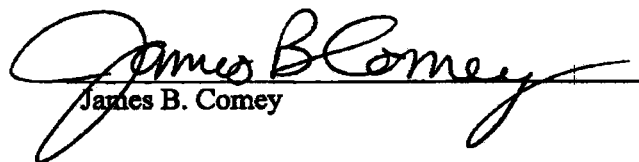
actions they allegedly may have taken in good faith reliance on representations from the Government, both telecommunications carriers and other corporations in the future will think twice before assisting any agency of the intelligence community seeking information. In the fight against terrorism, information private companies have -- particularly in the telecommunications field -- is a vital resource to the Nation. If immunity is not provided, it is likely that, in the future, the private sector will not provide assistance swiftly and willingly, and critical time in obtaining information will be lost. We wholeheartedly agree with the assessment of the report accompanying the bill from SSCI: "The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation." S. Rep. 110-209, at 11.


Finally, we note that we are familiar with the legal analysis conducted within the Executive Branch of intelligence activities allegedly connected to the lawsuits against telecommunications carriers and with debates within the Executive Branch about that analysis. Given our experiences, we can certainly understand that reasonable people may question and wish to probe the legal bases for such intelligence activities. We firmly believe, however, that the best place for that examination and debate is not in a public lawsuit against private companies that were asked to assist their Nation, but within the Executive branch, where intelligence-gathering decisions are made, and in joint efforts between the Executive Branch and Congress to ensure appropriate oversight.


For all of these reasons, we encourage the Committee to approve the carrier immunity provision as a fair, just, and equitable result that properly promotes a policy of encouraging the private sector to cooperate with the intelligence community.

Sincerely,

  
John D. Ashcroft

  
James B. Comey

  
Jack Goldsmith

  
Patrick F. Philbin

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