

IMMUNITY PROVISION INVITES PHONE COMPANIES TO COOPERATE WITH ILLEGAL GOVERNMENT PROGRAMS

Senator Feingold made an important argument in the Senate today. He explains how the FISA immunity provision invites telecoms to cooperate with illegal government programs.

For starters, current law already provides immunity from lawsuits for companies that cooperate with the government's request for assistance, as long as they receive either a court order or a certification from the Attorney General that no court order is needed and the request meets all statutory requirements. But **if requests are not properly documented, FISA instructs the telephone companies to refuse the government's request, and subjects them to liability if they instead decide to cooperate.** This framework, which has been in place for 30 years, protects companies that act at the request of the government while also protecting the privacy of Americans' communications.

Some supporters of retroactively expanding this already existing immunity provision argue that the telephone companies should not be penalized if they relied on a high-level government assurance that the requested assistance was lawful. Mr. President, as superficially appealing as that argument may sound, it utterly ignores the history of FISA.

Telephone companies have a long history of receiving requests for assistance from the government. That's because telephone companies have access to a wealth of private information about Americans – information that can be a very useful tool for law enforcement. But that very same access to private communications means that telephone companies are in a unique position of responsibility and public trust. And yet, **before FISA, there were basically no rules to help the phone companies resolve the tension between the government's requests for assistance in foreign intelligence investigations and the companies' responsibilities to their customers.**

This legal vacuum resulted in serious governmental abuse and overreaching. The abuses that took place are well documented and quite shocking. With the willing cooperation of the telephone companies, the FBI conducted surveillance of peaceful anti-war protesters, journalists, steel company executives – and even Martin Luther King Jr.

Congress decided to take action. Based on the history of, and potential for, government abuses, Congress decided that it was not appropriate for telephone companies to simply assume that any government request for assistance to conduct electronic surveillance was legal. Let me repeat that: **a primary purpose of FISA was to make clear, once and for all, that the telephone companies should not blindly cooperate with government requests for assistance.**

At the same time, however, Congress did not want to saddle telephone companies with the responsibility of determining whether the government's request for

assistance was a lawful one. That approach would leave the companies in a permanent state of legal uncertainty about their obligations.

So Congress devised a system that would take the guesswork out of it completely. Under that system, which was in place in 2001, and is still in place today, **the companies' legal obligations and liability depend entirely on whether the government has presented the company with a court order or a certification stating that certain basic requirements have been met.** If the proper documentation is submitted, the company must cooperate with the request and will be immune from liability. If the proper documentation has not been submitted, the company must refuse the government's request, or be subject to possible liability in the courts.

The telephone companies and the government have been operating under this simple framework for 30 years. **The companies have experienced, highly trained, and highly compensated lawyers who know this law inside and out.**

In view of this history, it is **inconceivable that any telephone companies that allegedly cooperated with the administration's warrantless wiretapping program did not know what their obligations were. And it is just as implausible that those companies believed they were entitled to simply assume the lawfulness of a government request for assistance. This whole effort to obtain retroactive immunity is based on an assumption that doesn't hold water.**

That brings me to another issue, Mr. President. I've been discussing why retroactive immunity is unnecessary and unjustified, but it goes beyond that.

Granting companies that allegedly cooperated with an illegal program this new form of automatic, retroactive immunity undermines the law that has been on the books for decades – a law that was designed to prevent exactly the type of actions that allegedly occurred here.

Remember, telephone companies already have absolute immunity if they complied with the applicable law. And they have an affirmative defense if they believed in good faith that they were complying with that law. **So the retroactive immunity provision we're debating here is necessary only if we want to extend immunity to companies that did not comply with the applicable law and did not even have a good faith belief that they were complying with it. So much for the rule of law.**

Even worse, granting retroactive immunity under these circumstances will undermine any new laws that we pass regarding government surveillance. If we want companies to follow the law in the future, it sends a terrible message, and sets a terrible precedent, to give them a "get out of jail free" card for allegedly ignoring the law in the past.

I find it particularly troubling when some of my colleagues argue that we should grant immunity in order to encourage the telephone companies to cooperate with the government in the future. They want Americans to think that not granting immunity will damage our national security. But if you take a close look at the argument, it doesn't hold up. The telephone companies are already legally obligated to cooperate with a court order, and as I've mentioned, they already have absolute immunity for cooperating with requests

that are properly certified. So the only thing we'd be encouraging by granting immunity here is cooperation with requests that violate the law. Mr. President, that's exactly the kind of cooperation that FISA was supposed to prevent.

And let's remember why. These companies have access to our most private conversations, and Americans depend on them to respect and defend the privacy of these communications unless there is clear legal authority for sharing them. They depend on us to make sure the companies are held accountable for betrayals of that public trust. Instead, **this immunity provision would invite the telephone companies to betray that trust by encouraging cooperation with illegal government programs.**

That pretty much sums it up: this immunity provision is an effort to incent telecoms to participate in illegal spying programs.