United States Senate

WASHINGTON, DC 20510

June 10, 2008

The Honorable Harry Reid
Majority Leader
S-211, U.S. Capitol
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House of Representatives
H-232, U.S. Capitol
Washington, DC 20515

The Honorable Steny Hoyer
Majority Leader
H-107, U.S. Capitol
Washington, DC 20515

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable John Conyers
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Rockefeller IV
Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

The Honorable Sylvester Reyes
Chairman
House Permanent Select Committee on Intelligence
H-405, U.S. Capitol
Washington, DC 20515

Dear Majority Leader Reid, Speaker Pelosi, Majority Leader Hoyer, Chairman Leahy, Chairman Conyers, Chairman Rockefeller and Chairman Reyes,

As you work to resolve differences between the House and Senate versions of the FISA Amendments Act of 2008, we urge you to include key protections to safeguard the privacy of law-abiding Americans, and not to include provisions that would grant retroactive immunity to companies that allegedly cooperated in the President's illegal warrantless wiretapping program.

With respect to immunity, we are particularly concerned about a proposal recently made by Senator Bond, and want to make clear that his proposal is just as unacceptable as the immunity provision in the Senate bill, which we vigorously opposed. As we understand it, the proposal would authorize secret proceedings in the Foreign Intelligence Surveillance Court to evaluate the companies' immunity claims, but the court's role would be limited to evaluating precisely the same question laid out in the Senate bill: whether a company received "a written request or directive from the Attorney General or the head of an element of the intelligence community … indicating that the activity was authorized by the President and determined to be lawful."

Information declassified in the committee report of the Senate Select Committee on Intelligence on the FISA Amendments Act, S. 2248, confirms that the companies received exactly these materials:

> The Committee can say, however, that beginning soon after September 11, 2001, the Executive branch provided written requests or directives to U.S. electronic communication service providers to obtain their assistance with communications intelligence activities that had been authorized by the President.
>
> ... The letters were provided to electronic communication service providers at regular intervals. All of the letters stated that the activities had been authorized by the President. All of the letters also stated that the activities had been determined to be lawful by the Attorney General, except for one letter that covered a period of less than sixty days. That letter, which like all the others stated that the activities had been authorized by the President, stated that the activities had been determined to be lawful by the Counsel to the President.

In other words, under the Bond proposal, the result of the FISA Court's evaluation would be predetermined. Regardless of how much information it is permitted to review, what standard of review is employed, how open the proceedings are, and what role the plaintiffs' lawyers are permitted to play, the FISA Court would be required to grant immunity. To agree to such a proposal would not represent a reasonable compromise.

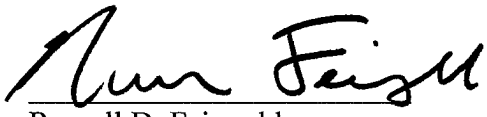
As we have explained repeatedly in the past, existing law already immunizes telephone companies that respond in good faith to a government request, as long as that request meets certain clearly spelled-out statutory requirements. This carefully designed provision protects both the companies and the privacy of innocent Americans. It gives clear guidance to companies on what government requests it should comply with and what requests it should reject because the requirements of the law are not met. The courts should be permitted to apply this longstanding provision in the pending cases to determine whether the companies that allegedly participated in the program should be granted immunity.

We also urge you to correct the significant flaws in the FISA provisions of the Senate bill, some of which were addressed in the House version. The Senate bill authorizes widespread surveillance involving innocent Americans and does not provide adequate checks and balances to protect their rights. First, it permits the government to come up with its own procedures for deciding who is a target of surveillance, and provides no meaningful consequences if the FISA Court later determines the government's procedures are not even reasonably designed to wiretap foreigners. Second, even if the government is wiretapping foreigners outside the U.S., those foreigners need not be terrorists, suspected of any wrongdoing, or even be of any specific intelligence interest. That means the government could legally collect all communications between Americans here at home and the rest of the world. Third, the Senate version of the bill

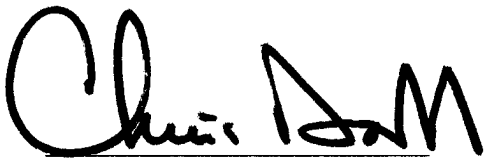
failed to prohibit the practice of reverse targeting – namely, wiretapping a person overseas when what the government is really interested in is an American here at home with whom the foreigner is communicating. Fourth, the Senate version of the bill failed to include meaningful privacy protections for the Americans whose communications will be collected in vast new quantities. We strongly believe that these problems should be corrected as the legislation moves forward.

Thank you for your consideration of these concerns. As this legislation moves forward, please know that we will strongly oppose any legislation that includes a grant of unjustified retroactive immunity and that does not adequately protect the privacy of law-abiding Americans.

Sincerely,



Russell D. Feingold



Christopher J. Dodd