

June 26, 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 reported amendments to the Foreign Intelligence Surveillance Act of 1978 ("FISA") Amendments Act of 2008 (H.R. 6304). Enactment of this bill, which passed the House of Representatives by a wide, bipartisan margin of 293-129, would represent an historic achievement to modernize FISA to reflect dramatic changes in communications technology over the last 30 years. We have appreciated the willingness of Congress to work closely with the Administration over the past year to make these necessary updates to FISA, and we commend Congress for all of its hard work to reach this point. This joint effort has involved compromises on both sides, and we believe that it has resulted in a strong bill that will place the Nation's foreign intelligence effort in this area on a firm, long-term foundation. We set forth the reasons for our strong support of this bill in the attached letter to Speaker Pelosi on June 19, 2008.

Throughout this process, we have consistently maintained that any effort to modernize FISA must accomplish two essential goals. First, the bill must provide the Intelligence Community with the tools it needs to collect the foreign intelligence necessary to secure our Nation while protecting the civil liberties of Americans. Second, the bill must provide the necessary 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. HR 6304 achieves both goals. It is a carefully crafted, bipartisan compromise negotiated in good faith by both sides over the course of several months. Accordingly, if any amendment that would jeopardize the authorities and protections contained in this bipartisan compromise were to succeed, we, as well as the President's other senior advisors, will recommend that he veto the bill.

Striking the Liability Protection Provisions. One reported amendment would strike Title II of H.R. 6304 in its entirety. This Title affords liability protection to telecommunications companies believed to have assisted the Government following the September 11th attacks. The Title also contains important provisions that would establish procedures for implementing existing statutory defenses in the future and that would preempt state investigations of assistance provided by any electronic communication service provider to an element of the Intelligence Community. Those provisions are important to ensure that electronic communication service providers can

take full advantage of existing liability protection provisions and to protect highly classified information. The amendment would strike all of these critical protections.

Affording liability protection to those companies believed to have assisted the Government with communications intelligence activities in the aftermath of September 11th is a just result and is essential to ensuring that our intelligence community is able to carry out its mission. After reviewing the relevant documents, the Senate Intelligence 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. In its Conference Report, the Committee “concluded that the providers ... had a good faith basis” for responding to the requests for assistance they received. The Committee agreed to the necessary legal protections on a nearly-unanimous, bipartisan, 13-2 vote, and the Senate passed a prior version of this bill (S. 2248) including liability protection by a bipartisan margin of 68-29. Before passing S. 2248, the Senate also rejected an amendment to strike the liability protection provisions on a similar bipartisan basis (67-31).

The liability protection contained in H.R. 6304 applies only in a narrow set of circumstances. An action must be dismissed if the Attorney General certifies to the district court that either: (i) the electronic communications service provider did not provide the assistance; or (ii) the assistance was provided in the wake of the September 11th attack, and was the subject of a written request or series of requests from a senior Government official indicating that the activity was authorized by the President and determined to be lawful. The district court would be required to review this certification before the action is dismissed, and the bill allows for the participation of the parties to the lawsuit in a manner consistent with the protection of classified information. The liability protection provision does not extend to the Government or Government officials, and it does not immunize any criminal conduct.

Providing this liability protection is critical to the national security. As the Intelligence Committee recognized, “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. The committee concluded that: “The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.” Allowing continued litigation also risks the disclosure of highly classified information regarding intelligence sources and methods. In addition to providing an advantage to our adversaries, the potential disclosure of classified information puts the facilities and personnel of electronic communication service providers at risk.

As the Intelligence Committee recognized, affording liability protection to companies alleged to have assisted the Government in the aftermath of September 11, 2001, is critical to the national security. For these reasons, we, as well as the President's other senior advisors, will recommend that the President veto any bill that does not afford liability protection to these companies.

Requiring a Merits Adjudication of Constitutional Claims. Another reported amendment would foreclose an electronic communication service provider from receiving retroactive liability protection if the court were to determine that the provider assisted the Government in connection with an unconstitutional intelligence activity. This amendment is unacceptable. First, the aim of the amendment appears to be an adjudication of the Government's prior actions. But the lawsuits at issue are against the companies, not the Government, and Congress should not allow the companies to be subjected to billion-dollar claims only because they are believed to have answered the Government's request for assistance, particularly after the Senate Intelligence Committee concluded that any companies that provided assistance acted in good faith. The liability protection provision in H.R. 6304 applies only to lawsuits brought against the companies and not to suits against the Government or Government officials.

Second, by requiring a merits adjudication of the plaintiffs' constitutional claims, this provision would significantly negate a major purpose of the 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. Indeed, this amendment would unnecessarily complicate and prolong the litigation. The companies being sued would continue to be subjected to the burdens of litigation, such as attorneys' fees and disruption to their businesses from attempted discovery. As the Senate Intelligence Committee recognized, such litigation could deter private sector entities from providing lawful assistance to the intelligence community in the future.

Third, the amendment would risk the disclosure of highly sensitive classified information concerning intelligence sources and methods—information that would be necessary to adjudicate the plaintiffs' constitutional claims. After all, adjudicating whether the alleged underlying intelligence activity was unconstitutional would require the disclosure of the nature, scope, reasons for, and results of, the alleged intelligence activity. Such a proceeding likely would lead to the disclosure of highly sensitive national security information and would be contrary to the well-established state secrets privilege doctrine, pursuant to which civil suits must be dismissed if classified information is necessary, for example, to make a prima facie case or to assert a defense. The contemplated proceeding could not occur consistent with this doctrine and the protection of classified information and without raising serious constitutional questions concerning the President's authority to protect such information.

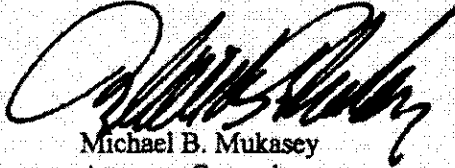
For these reasons, we, as well as the President's other senior advisors, will recommend that the President veto any bill that includes this amendment.

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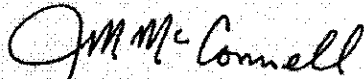
Thank you for the opportunity to present our views on this crucial bill. We reiterate our sincere appreciation to the Congress for working with us on H.R. 6304, a

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