



FISA Modernization:

Lawmakers Should Reject Retroactive Amnesty for Telephone Company Violation of Millions of Americans' Privacy Rights

BACKGROUND: Since 1978, federal civil and criminal laws — administered by federal judges — have protected Americans from unwarranted spying on their phone calls and other communications. Telephone companies have been and remain immune for assisting the government in conducting electronic surveillance authorized under these statutes. Now, the Administration and the phone companies suddenly argue that a sweeping blanket amnesty is needed to shield telephone companies retroactively in pending litigation. These cases, based on whistleblower evidence of a wholesale NSA dragnet of millions of Americans' communications, have been brought by real, live individuals for this egregious violation of their privacy.

ISSUE: Full retroactive telephone company amnesty has no prospective justification. Here are the facts:

- **The pending lawsuits pose no threat to national security.** For over 25 years, the federal courts have — without a single leak — heard all manner of sensitive national security evidence presented behind closed doors. No changes to current law are necessary to allow these suits to safely proceed.
- **Potential damages in these cases will only be very large if the phone companies violated existing privacy laws on a massive scale.** If in fact that is true, all the more reason to allow federal courts to hear the present cases to conclusion. That said, statutory provisions capping telephone company damages in a way that leaves real teeth in current privacy protection laws while ensuring that any damage award is not catastrophic for the carriers is far preferable to amnesty for lawbreakers.
- **Phone company threats that they will halt cooperation with the intelligence community in the future unless they receive retroactive amnesty are simply illogical.** Current law already immunizes the phone companies' future assistance based on a directive from the Attorney General and the Director of National Intelligence, or a court order. Nothing in pending legislation changes that.
- Federal law has for decades clearly established when telephone companies may assist the government in electronic surveillance without fear of liability or prosecution. Their present insistence on sweeping new amnesty only make sense if they deliberately ignored these longstanding laws and violated the rights of millions of Americans. Qwest properly refused to cooperate with the government when it was not presented with the legally required authorization. **Federal courts must be permitted to determine, subject to appropriate security procedures, whether the companies in the pending litigation could have and should have done the same.**

The Electronic Frontier Foundation, lead counsel in the pending class action lawsuit against AT&T, urges Members of Congress to oppose any changes to the Foreign Intelligence Surveillance Act that will foreclose judicial review of the wholesale domestic surveillance of millions of ordinary Americans.

Electronic Frontier Foundation www.eff.org

Contacts: Kevin Bankston of EFF at (415) 748-8126 or Adam Eisgrau (202) 215-6884