

November 28, 2007



The Honorable Harry Reid
Majority Leader
528 Hart Senate Office Building
Washington, DC 20510

Dear Senator Reid:

We write to urge the Senate to reject the sweeping retroactive immunity for electronic communication service (ECS) providers that would be established by amendments to the Foreign Intelligence Surveillance Act contained in S. 2248, reported by the Senate Select Committee on Intelligence. Enactment of this measure into law would risk closing courthouse doors to untold numbers of United States citizens seeking to vindicate both their constitutional rights and their rights under contracts with their ECS providers. Moreover, this measure would further advance the dangerous campaign of President Bush to prevent the courts from adjudicating the rights of ordinary Americans and to substitute Orwellian secrecy for the transparent application of the rule of law by neutral and independent judicial officers.

If ECS providers unlawfully gave the government access to information about their customers, they must be held accountable; and, in turn, government officials must be held accountable for seeking information they knew Americans expected to be kept private. Section 202 of S.2248 would eliminate that accountability if the Attorney General certifies that access was provided “in connection with an intelligence activity involving communications” that was authorized by the President and “designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States.” This provision substitutes the biased legal and factual judgment of the Executive Branch—which could easily be used to conceal unlawful and unconstitutional activities—for the impartial factual and legal judgment of judges. Although this section permits court review of the certification, that review is limited to instances of “abuse of discretion,” an extremely permissive standard that weights the court’s determination in favor of the Attorney General. Furthermore, the language of the bill is so broad that it will be very difficult for courts to set aside certifications by the Attorney General.

The bill’s transfer of power from the Judiciary to the Executive Branch is especially troubling given the Bush Administration’s established record of seeking to insulate its actions from oversight by the other co-equal branches of government. The bill essentially permits the President and Attorney General to cover up their own wrongdoing, with a court permitted to expose that cover up

only if it is sufficiently inept to come across as an “abuse of discretion.” On the issue of illegal breaches of Americans’ privacy, Congress must side with ordinary citizens, and not with telecommunications giants and an Administration dedicated to concealing its own misconduct. The Senate should refuse to give its stamp of approval to the Bush’ Administration’s attempt to whitewash its invasion of Americans’ privacy by rejecting immunity for ECS providers.

Sincerely,

A handwritten signature in black ink, appearing to read "Nan Aron". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nan Aron
President
Alliance for Justice