February 2008

TO: Interested Parties

FROM: Matt Bennett and Jon Cowan

RE: FISA and Immunity for the Telecommunications Industry

As Congress debates revisions to the Foreign Intelligence Surveillance Act (FISA), the main point of contention is whether to grant retroactive immunity to the telecommunications companies that cooperated with the government in the aftermath of 9/11 and handed over information about their customers. This issue has divided the progressive community, with many arguing against providing immunity. We disagree. We think that there are compelling principles requiring that companies be immunized in these cases and that the proper defendant is the government.

The facts in these cases are both well known and totally obscure. What is known is that in the immediate aftermath of 9/11, the FBI sent letters to several telecom companies seeking information about the phone calls and internet activity of some of their customers and claiming that there were urgent – and highly classified – national security interests at stake. The letters certified that the activities had been authorized by the President and determined to be lawful by the Attorney General and the Counsel to the President. The telecom companies now are facing lawsuits by private plaintiffs and several state public utility commissions alleging violations of privacy rights. Together, the damages sought are in the hundreds of billions of dollars.

What is not publicly known – and has remained highly classified – are the specific substantive grounds for the requests or the circumstances that the government claims prevented it from getting warrants in each of these instances. We know only that the context for these requests was post-9/11 America, where intelligence failures had led to the most catastrophic foreign attack on American civilians in history. In the days, weeks and months that followed, there was a powerful national consensus that we would all work together to do what we must to prevent it from happening again.

Given that context, we believe that the Senate Intelligence Committee was correct in finding that these lawsuits against the telecom companies should not go forward. We offer three principles that we used in reaching this determination:

1. **Due process of law.** Progressives, including Third Way, have argued that the prison at Guantanamo Bay should be shut down and the prisoners there should be provided with constitutional protections, most importantly the right of due process. It is not only unfair, it is un-American for this nation to deny anyone the right to defend themselves on the grounds that the evidence in their case is secret. If that principle applies to those accused of plotting to attack America, then surely it also applies to those accused, rightly or wrongly, of missteps in their attempts to help defend the nation.

That is precisely what is happening to the telecom companies. The government has asserted that the letters and other corresponding information are classified, so the companies would be violating the State Secrets Act – and committing a felony – if they use those documents in their own defense. Moreover, while some argue that procedures could be devised to allow judges to see the evidence, there is no way (short of the government declassifying the documents) for the ultimate decision-makers – the juries – ever to see this potentially exculpatory material. There is little difference between denying companies the right to present information they need for a full defense and denying Guantanamo prisoners those same rights. Both violate the letter and spirit of the Constitution.

2. **Representational government.** The potentially exculpatory information in this case is beyond top secret. It falls under a category known as "eyes only," which prohibits even those with top secret clearances to view the documents. But the elected members of the Senate Intelligence Committee have seen them, and when they took a look at all of the secret evidence, they voted 13-2 in favor of immunity. Progressive Senators like Barbara Mikulski and Sheldon Whitehouse joined Chairman Jay Rockefeller and frequent Bush administration critic Chuck Hagel in supporting immunity in these cases. As the Committee report states, they found, after reviewing the classified material and talking to the relevant actors in the companies, law enforcement and intelligence, that the telecom providers had "acted on a good faith belief that the President's program was lawful."[i]

   Voting for this bill and report language therefore was akin to a finding that the telecom companies had *not* violated the law, or that their affirmative defense was powerful enough to overcome a claim that they had. While this is a civil law context, the Senate Intelligence Committee essentially acted as a grand jury in these cases, looking at the evidence and finding that there were not sufficient grounds to allow claims against the defendants to go forward.

   Another group of our representatives – not elected officials, but their proxies - also have backed immunity: key members of the 9-11 Commission. Progressives have focused time and again on the 9/11 Commission as the paragon of homeland security expertise; implementing the Commission's 40 recommendations was one of the central promises of the congressional majority. Two of the progressive 9/11 Commissioners publicly have come down squarely on the side of the Senate Intelligence Committee. Commission Co-Chair Lee Hamilton and Commissioner Bob Kerrey both published op-eds in support of immunity. Hamilton said that telecom companies are central to the war on terror, and that "dragging [the companies] through litigation would deter companies and private citizens from helping in future emergencies."[ii] Kerrey noted that the 9/11 Commission called for "unity of purpose and unity of effort" to "defeat our enemy and make America safer," concluding: "We cannot hope to achieve such unity of effort if on the one hand we call upon private industry to aid us in this fight, and on the other allow them to be sued for their good-faith efforts to help."[iii]

   We have put our trust in the judgment of these progressive leaders on many issues relating to intelligence and homeland security; we trust it here, too.

3. **Holding the property party accountable.** There is no question that both government and private industry must be required to act responsibly when it comes to protecting basic rights like privacy, and when they fail to do so, they should be held to account. Moreover, Third Way has never argued that there was no wrongdoing in the post-9/11 wiretapping by the Bush administration. Indeed, some aspects of the administration's eavesdropping activity clearly were illegal, and if innocent Americans were injured as a result, the government should be held responsible. That means that victims should be able to sue the government for recompense, and sovereign immunity waived if necessary by congressional action.

   Permitting lawsuits against the government rather than the companies in these cases is the right course. First, if abuses occurred, they are the responsibility of the government, who asked for the data in the first place. Second, it was the government that made representations as to the legality of these actions. Third, the government is not left to litigate these cases without due process – it can declassify documents to use in its own defense.

   Some current lawsuits have named the government as a defendant, and those would proceed under the bill. As the report notes, "nothing in this bill is intended to affect these suits against the Government or individual Government officials."[iv]

   Demanding that the actual wrongdoers be held to account also requires that private entities be held responsible if they violate the law going forward, and the Senate Intelligence bill is careful to avoid setting a precedent that would preclude future action. As the report makes clear, the immunity offered in their bill is limited in scope and is targeted at "the unique historical circumstances of the aftermath of 9/11." The bill is crafted to avoid "disrupting the balance of incentives for electronic communication service providers to mandate compliance with statutory requirements in the future." The Committee writes that the action "should be understood by the Executive branch and providers as a one-time response to an unparalleled national experience in the midst of which representations were made that assistance to the Government was authorized and lawful."[v]

Third Way arrived at our support for the Senate Intelligence Committee legislation only after careful consideration. As a general rule, we oppose grants of immunity to industry – for example, we fought hard against the last Congress' immunization of the firearms industry. Usually, public trials are useful for determining truth. But when the evidence is classified, the truth cannot come out. Moreover, our security will be threatened if companies – in telecommunications or other fields – use these lawsuits as a reason to avoid future cooperation with terrorism investigations. Therefore, we believe that this limited and carefully crafted grant of immunity should be applied.

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[i] *Foreign Intelligence Surveillance Act of 1978; Amendments Act of 2007*, Report of the Senate Select Committee on Intelligence (SSCI) (Oct. 26, 2007) http://intelligence.senate.gov/071025/report.pdf.

[ii] Lee H. Hamilton, "Immunity for Wiretap Assistance is Right Call," *The Baltimore Sun* (Nov. 4, 2007).

[iii] Bob Kerrey, "Private sector should cooperate with terrorism investigators," *The Hill* (Nov. 8, 2007).

[iv] SSCI Report

[v] Ibid.