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STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS
-- (Senate - December 03, 2007)

By Mr. SPECTER:

S. 2402. A bill to provide for the substitution of the United States in certain civil actions; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I seek recognition to introduce The Foreign Intelligence Surveillance Substitution Act of 2007, to substitute the Federal Government for the telephone companies in litigation challenging the so-called Terrorist Surveillance Program. This is a very complex issue, and I have been discussing it at length with my colleagues on the Judiciary Committee. It does raise some very important questions, and I begin my analysis by acknowledging the good citizenship of the telephone companies for whatever it is that they have done. We still don't know all of what that is. But I do not believe that it is appropriate to grant what is called "retroactive immunity" because of what has occurred here.

The legislation substitutes the U.S. in place of any electronic communication service company which provided communications in connection with an intelligence activity that was authorized by the President between September 11, 2001, and January 17, 2007, and designed to detect or prevent a terrorist attack against the U.S.

In order for substitution to apply, the electronic communications service provider must have received a written request 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. If the provider assisted the Government beyond what was requested in writing, this legislation will leave the provider on the hook for any surplus assistance. On the other hand, the Government will be substituted if the Attorney General certifies that the electronic communications service provider did only what the Government asked. Once substitution occurs, Federal and State courts are directed to dismiss the providers from the action.

This legislation provides that plaintiffs in these cases may continue to send third-party discovery requests such as Rule 45 subpoenas to the electronic communications service providers after they have been dismissed. Moreover, the bill provides that plaintiffs may also deem provider admissions as Government admissions in their case against the Government. My legislation provides that the Government will not have sovereign immunity in the 40 or so cases currently pending in the California Multi-District Litigation.

This bill provides authority for the U.S. to remove actions from State court to Federal court. Notably, the legislation is intended to ensure that the Government can only assert those defenses the electronic communications companies may assert under current law. On the other hand, nothing in the bill is designed to increase or diminish the ability of the Government to assert the States Secret privilege. The legislation is carefully crafted so as not to disturb plaintiffs' standing to bring their claims against the Government.

Now, recognizing the telephone companies are good citizens, I am prepared to see their involvement held to the minimum. We hear concerns about them being involved in litigation. Well, I don't know if there's much litigation

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for them to be involved in once the Federal Government is substituted. Some express dismay over the continued burden of discovery. I am not convinced there will be much further discovery here. Some have expressed a reticence to having their service technicians, in-house counsel, and other employees called as witnesses. Yet, I don't know that they are necessarily going to be witnesses. We can't judge that now.

I believe there are very important--perhaps even constitutional--privacy issues here that ought to be subjected to judicial review. We know that important litigation in the Federal court in San Francisco, Judge Walker has declined to dismiss a challenge to the Terrorist Surveillance Program on State secrets grounds.

I don't think Congress can stand by, and in the face of what has happened, give carte blanche, a free ticket, grant retroactive immunity to suggest to future administrations that they can ignore separation of powers and they can ignore Congressional oversight and just run roughshod over the entire process without being held accountable. The better practice is to allow judicial proceedings to take their course and let the courts make their own determinations.

I strongly encourage all of my colleagues, Republicans and Democrats alike, to carefully consider this bill as we begin to debate the related FISA Amendments Act of 2007.